NASA Advisory Implementing Instruction

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SPACE ACT AGREEMENTS GUIDE

Responsible Office: Office of the General Counsel

***Note*:** This Guide is intended to explain NASA agreement practice and provide assistance to those involved in formation and execution of Space Act Agreements. It does not establish substantive or procedural requirements. All references to such requirements contained in NASA Policy Directives (NPD), Advisory Implementing Instructions or other guidance should be verified by reviewing the cited authority directly.

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CHAPTER 1. INTRODUCTION

This Space Act Agreements Guide (Guide) contains references to requirements found in NASA Policy Directives, NASA Procedural Requirements, Implementing Instructions, and other guidance. Where possible, for ease of use, the Guide provides links to on-line versions of these documents. In all cases, the reader should rely on the source documents themselves rather than any summary references found in this Guide.

1.1. AUTHORITY AND POLICY

NASA's organic statute, the National Aeronautics and Space Act of 1958 (Space Act), as amended (42 U.S.C. § 2451 et seq.), grants NASA broad discretion in the performance of its functions. Specifically, Section 203(c)(5) of the Space Act authorizes NASA:

> to enter into and perform such contracts, leases, cooperative agreements, or *other transactions* as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution.[1]

Arrangements concluded under the "other transactions" authority of the Space Act are commonly referred to as Space Act Agreements (SAAs). NASA uses this authority to enter into a wide range of agreements with numerous entities to advance NASA mission and program objectives. The Space Act also authorizes NASA to use its "other transaction" authority to conduct international cooperative space activities under international agreements.[2]

NASA Policy Directive (NPD) 1050.1H, "Authority to Enter into Space Act Agreements" identifies organizational responsibilities, mandatory legal provisions, delegation of signatory authority, and minimum organizational concurrence requirements. NPD 1050.1H paragraph 5.g permits limited redelegation of signatory authority in writing.[3] This Space Act Agreements Guide (Guide) has been issued as NASA Advisory Implementing Instruction 1050-1 in support of NPD 1050.1H. This Guide provides instructions and guidance for developing effective SAAs to meet the needs of NASA and the other party to the SAA.[4] Like NPD 1050.1H, this Guide is applicable to NASA Headquarters and NASA Centers, including Component Facilities. It is intended to facilitate commonality of SAA terms, consistent practices and oversight of the process for entering SAAs, and consistent treatment of partners and users of NASA facilities

[1] 42 U.S.C. § 2473 (c)(5) (emphasis added).

[2] § 205 of the Space Act; (42 U.S.C. § 2475).

[3] Officials delegated or redelegated responsibility for executing SAAs are referred to herein as "signing officials"

[4] The other party to the SAA is referred to herein as the "partner".

throughout the Agency. Additional policy guidance and information is available on the Space Act Agreement Community of Practice website located on the Inside NASA portal[5]

This Guide describes classes of SAAs organized according to the type of activity and identity of the partner and identifies, in accordance with NPD 1050.1H, requirements and provisions that must be in every SAA. It makes no attempt, however, to assemble or reference subject matter-related requirements for SAAs. Mission Directorates or program offices typically have subject matter-related or other applicable requirements for conducting specific scientific or technical activities, which should be consulted.

1.2. SPACE ACT AGREEMENT DEFINED

The term "agreement" in its broadest context includes any transaction the Space Act authorizes the Agency to conclude (*i.e.*, contracts, leases, grants, cooperative agreements, or other transactions). Agreements establish a set of legally enforceable promises between NASA and the other party to the agreement, requiring a commitment of NASA resources (including personnel, funding, services, equipment, expertise, information, or facilities) to accomplish stated objectives.

As discussed in Sec. 1.1., this Guide focuses on agreements to be concluded under NASA's "other transactions" authority of the Space Act, specifically, transactions that generally cannot be concluded under other statutory authority of the Agency. Thus, this Guide does not address, for example, Grants[6] and Cooperative Agreements[7] under the Federal Grants and Cooperative Agreements Act of 1977 (commonly referred to as the Chiles Act) (*see* NPR 5800.1E, Grant and Cooperative Agreement Handbook), Federal Acquisition Regulation contracts under the Armed Services Procurement Act (10 U.S.C. § 2302), or real property leaseholds, easements, permits, and licenses. Similarly, this

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[5]The Space Act Agreement Community of Practice Website is available at: http://insidenasa.nasa.gov/saa/home/index.html.

[6] 31 U.S.C. § 6304. Using grant agreements: An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

[7] 31 U.S.C. § 6305. Using cooperative agreements: An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

Guide does not address Cooperative Research and Development Agreements (CRADAs) authorized by the Stevenson-Wydler Technology Innovation Act.[8] In general, SAAs are not subject to restrictions on or regulations implementing these other statutory authorities.

This Guide categorizes SAAs according to the character of the partner (*e.g.*, a public or private entity), whether U.S. or international law applies, and by the character of the parties' financial obligations. Under a **reimbursable agreement**, the partner pays for work NASA conducts for the partner's benefit.[9] Under a **nonreimbursable agreement**, each party assumes responsibility for its own costs.[10] Under a **funded agreement**, NASA provides funding to the partner.[11]

1.3. AGREEMENT FORMATION PROCESS

One of the principal purposes of this Guide is to foster consistent practice in the formation of SAAs at all NASA Centers. To this end, this Guide also prescribes procedures to expedite conclusion of SAAs.

Note: As used in this Guide, the phrase, "concluding an SAA," refers to concluding the SAA formation process (initiation, negotiation, review, and concurrence) by the parties executing (signing) the SAA, as opposed to concluding the performance of the SAA by the parties completing their responsibilities and milestones under the SAA.

Role of Agreement Manager

Consistent with NPD 1050.1, Section 5.f., an "Agreement Manager" must be identified for each SAA. The primary purpose of the Agreement Manager is to shepherd the SAA through the process required to conclude an SAA in accordance with NPD 1050.1H and this Guide (*i.e.*, initiation, negotiation, review, concurrence, execution by the NASA signing official, and storage of the signed version of the SAA in the Space Act Agreements Maker (SAAM) database or other approved repository).

The Agreement Manager may be the individual responsible for SAA formation (*e.g.*, providing a preliminary abstract for review by the Office of Program and Institutional Integration (OPII), collecting information needed during the SAA formation process, conducting negotiations, and moving the SAA through the review and concurrence cycle) or may act in a facilitator/oversight role to ensure SAAs are concluded in accordance

[8] 15 U.S.C. § 3710 *et seq*. The Stevenson-Wydler Act permits Government-operated federal laboratories to enter into CRADAs for the purpose of transferring federally developed or controlled technology to the private sector. The federal laboratory can provide personnel, services, facilities, equipment, intellectual property, or other resources (but not funds) to non-federal parties with or without reimbursement. NASA has statutory authority to enter into CRADAs, but generally does not use this authority when NASA's technology transfer objectives can be achieved through use of an SAA.

[9] *See infra* Section 1.5.

[10] *See infra* Section 1.4.

[11] *See infra* Section 1.7.

with NPD 1050.1H and this Guide. Centers have flexibility to identify one or more individuals as Agreement Manager(s) and to identify individuals to perform the functions identified below in coordination with the Agreement Manager(s). Additionally, existing roles established at Centers to facilitate SAA formation may perform the function of, and be identified as, an Agreement Manager.[12]

The Agreement Manager is responsible for performing the following tasks (or ensuring that Center personnel identified for this role perform these tasks):

1. Collecting all data needed to initiate and conclude the SAA in a satisfactory manner, which requires that mutual expectations are established for NASA and the potential partner:

    - Developing and circulating any abstract information required to support the preliminary abstract review process (*see below*),

    - completing the information in the Space Act Agreement questionnaires (*see* Appendix 1; also available through the Space Act Agreement Maker (SAAM) website) that provide information necessary to define the parties' responsibilities and establish the terms and provisions of the SAA,

    - determining resource availability (funding, services, equipment, expertise, information, and facilities),

    - identifying the funding source for NASA's responsibilities,

    - validating viability of the potential partner's proposed business case, and

    - setting mutually agreed processing times;

    - determining when an SAA has been sufficiently reviewed within NASA that it can be shared with the potential SAA partner.

2. Identifying offices or individuals whose concurrence is required for conclusion of the SAA and establishing a schedule for review by those offices or individuals. To that end, the Agreement Manager must maintain a system for tracking and documenting the time required for each phase of the review;

3. Monitoring the SAA formation process to ensure NASA meets the pre-established expectations/deadlines of the parties; and

4. Preparing an adequate "review package" for the NASA signing official.

5. Uploading the signed version of the SAA in SAAM or other approved repository.

[12] At many Centers these individuals are called "Agreement Specialists."

The Agreement Manager should carry out his or her responsibilities with the following guidance in mind.

The Agreement Manager should facilitate the fair and consistent conclusion of SAAs. From the perspective of both NASA and its potential partners, it is important that fairness and consistency guide the initiation and execution of all SAAs. Federal ethics laws and Standards of Conduct require that NASA employees avoid unjustifiable favoritism, whether actual or perceived, in dealing with potential partners. Since signed SAAs are nearly always available for public review, outside entities may judge the fairness of NASA treatment of partners by comparing similar SAAs. Similarly situated persons should be treated alike. However, sometimes there are valid and important reasons for special terms and conditions offered to a particular partner. For example, circumstances may exist that warrant exclusivity (*see* Sec. 2.2.8). If, however, a proposal confers preferential treatment on a partner, whether actual or perceived, provides for private gain to any party, or presents the likelihood of conflicting financial interests arising from any provisions of the agreement, early advice should be sought from the Office of the General Counsel or Chief Counsel, as appropriate.

The Preliminary Abstract Review Process

The Office of Program and Institutional Integration (OPII) is responsible for coordinating the NASA-wide preliminary review of proposed Space Act Agreement activities which have a significant impact on the Agency (*described below*).[13] Accordingly, Centers and Headquarters offices proposing to initiate certain Space Act Agreements must forward abstracts of key information to OPII[14] prior to negotiating or committing to any such agreements.

1. Required Content for Abstracts:

Abstracts should include the following information, to the extent applicable, in addition to any other information the initiator considers relevant to facilitate OPII's review. Abstracts are typically 1 – 2 pages:

(a) overall description of proposed activity/activities, type of Agreement proposed and applicable authority, responsible NASA personnel, intended Agreement Partner (including beneficiaries of the activity), and indication of whether the intended partner or other beneficiaries of the activity are foreign entities;

(b) responsibilities of NASA and the Agreement Partner;

(c) performance, or other milestones;

(d) financial commitments by NASA or the Agreement Partner;

[13] OPII is also responsible for the preliminary review of Enhanced Use Lease Agreements agency-wide, *See* NPR 8800.15, Real Property Management Program Implementation Procedural Requirements.

[14] Attn: Office of Program and Institutional Integration, Mail Suite 8T39.

(e) resource commitments (personnel, facilities, and equipment) by NASA or the Agreement Partner

- for all SAAs, an estimate of the number of NASA civil service full-time equivalents and NASA contractor work-year equivalents to be committed for each year of the activity, description of skill categories, and a description of any NASA facilities and key equipment or assets to be committed;
- for reimbursable SAAs, a description of how the NASA goods, services, and facilities to be committed are unique and not otherwise available on the U.S. commercial market from another source;

(f) a description of the applicable data rights provisions, if anticipated to vary from the recommended language (this information is especially important for any proposed activities with or "for the benefit of" a foreign entity)[15];

(g) proposed term of Agreement;

(h) affected NASA Headquarters Mission Directorate(s), Headquarters Mission Support Offices, or other Centers, if any; and

(i) a description of how the proposed activities support NASA missions.

Upon receipt of the abstract, OPII will review the proposed activity to ensure Agency awareness and coordination of SAA activities. This review will be coordinated with other affected or interested Headquarters organizations including the Mission Directorates, the Office of External Relations (OER), the Office of the General Counsel, and other applicable Mission Support Offices, as well as affected Centers. OPII will either approve proceeding with the activity based on the information in the abstract, or may request more information to complete its review. OPII will facilitate timely resolution of any issues with a commitment to try and complete its review process within five (5) business days. After OPII approval of the activity and prior to concluding the Agreement, the Agreement Manager is responsible for making OPII aware of any significant changes to the proposed activity, parties, terms and conditions.

2. Qualifying SAAs

Preliminary abstract review is required for all proposed Space Act Agreement activities (including Umbrella Agreements, Annexes, and SAAs concluded under specialized agreement titles) that could have a significant impact on the Agency. In determining which activities may have a significant impact on the Agency, initiating offices should follow the guidelines below. These guidelines are intended to minimize the burden on initiating offices by excluding certain types of activities where the risk from those activities is minimal. In those cases when OPII review is not mandatory, initiating offices are expected to use their judgment, based on the guidelines, in determining when abstracts should be submitted for OPII review.

[15] NPD 1370.1

3. Guidelines for Submission of Abstracts for OPII Review

(a) SAAs requiring OPII review:
- Involve foreign entities, either directly as a partner, or indirectly (e.g., the activity is "for the benefit of" a foreign entity, pursuant to NPD 1370.1)
- Involve the commitment of NASA resources--whether facilities, equipment, or critical personnel skills--identified by one or more Mission Directorates as "essential resources" for NASA mission work[16];
- Involve activities that are under the jurisdiction of a Headquarters office or a Center other than the originating Center (e.g., Center requests for microgravity research activities, which are under the cognizance of the Headquarters Shared Capabilities Assets Program).

(b) SAAs generally requiring OPII review:
- Involve activities that are likely to be newsworthy. (Is a press release anticipated by NASA or the Agreement Partner)?
- Involve activities that may receive industry attention.
- Has a direct impact on a NASA Mission Directorate's activities, assets, or planning processes.
- Other government entities are involved or likely to be affected.
- Requires a large budget.
- Resultant agreement is anticipated to include unusual waivers (cost or policies).
- Involve novel agreement types or activities.

(c) SAAs generally not requiring OPII review:
- Renewals or extensions of existing routine, previously vetted agreements with U.S. partners.
- Agreements for routine, previously vetted activities with U.S. partners with whom NASA has worked repeatedly in the past.

(d) SAA's requiring a waiver of review
- For certain categories of historical or long-established activities (for example, astronaut appearances, GSFC-NOAA work, wind tunnel test services for American industry or non-Federal governmental entities), preliminary abstract review may be waived. A waiver is granted based on a consideration of minimal risk to the Agency. Centers should send waiver requests to OPII for consideration, explaining their rationale for why these categories present minimal risk and should not require preliminary review.

As a "rule of thumb," when in doubt, initiating offices should forward abstracts to OPII for review.

[16] *See*, the Space Act Agreement Community of Practice Website, available at: http://insidenasa.nasa.gov/saa/home/index.html.

Space Act Agreement Review and Concurrence

The Agreement Manager is responsible for facilitating the review and concurrence cycle for all SAAs within his or her area of responsibility. Thus, a primary responsibility of the Agreement Manager is to ensure timely involvement, review, and approval by required NASA reviewing offices. To this end, the Agreement Manager works to ensure that reviewing offices are aware of agreed processing deadlines and comply with them. Those responsible for reviewing agreements should utilize a system for tracking and documenting the dates associated with their review. If for any reason the review will be delayed (*e.g.*, due to inadequate information regarding the understanding of the parties with regard to key issues, complexity of the transaction, or competing workload priorities), they should provide prompt written notice to the Agreement Manager explaining the cause of the delay and providing an estimate of the time necessary to complete review. Failure to involve affected Directorate or Program offices, leadership at affected Centers, resource providers (*i.e.*, personnel, funding, services, equipment, expertise, information, and facilities providers), and key mission support offices (particularly the offices of the Chief Financial Officers, the General Counsel or Chief Counsel, as appropriate, and Export Control, where applicable) can often delay development and execution of SAAs. Consequently, early involvement of these offices in a transaction – in addition to any written concurrence required to conclude an SAA – is strongly encouraged.

In particular, the Agreement Manager(s) should ensure early coordination with:

1. The Office of Program and Institutional Integration (OPII) for preliminary abstract review (if required).

2. The Office of the General Counsel (for Headquarters Agreements) or Chief Counsel (for Center Agreements).

    - Early coordination is critical to developing a legally sufficient SAA in a timely manner. NASA attorneys provide advice and counsel related to all aspects of proposed transaction in addition to determining legal sufficiency; however, the final business decision is a functional responsibility of the NASA signing official. NASA attorneys also provide sound legal guidance on appropriate and effective means for structuring transactions to meet NASA's needs.

    - In accordance with NPD 1050.1H, all SAAs must have legal review prior to execution. However, the officials authorized, in NPD 1050.1H, to execute, amend, and terminate Agreements may establish guidelines for when SAA drafts may be provided to a prospective partner for initial review (but not execution) prior to legal review (e.g., pre-established categories of routine agreements or agreements with no changes to pre-established clauses).

    - The Agreement Manager should determine, among other things, whether a proposed SAA falls under the pre-established guidelines for agreements not

requiring legal review of initial agreement drafts or if it requires legal review before an initial draft can be transmitted to a prospective partner for review.

3. NASA Headquarters officials and Center Chief Financial Officers (CFOs) responsible for reviewing NASA's proposed resource commitments under reimbursable and funded SAAs.

   - In accordance with NPD 1050.1H, and as detailed in Sections 1.5, 1.6 and 2.2.6 of this Guide, estimates of the value of the NASA resources (including cost estimates) to be committed under reimbursable and funded SAAs must be prepared before NASA may enter such SAAs.

   - These estimates must be reviewed by the Director for Headquarters Operations (for Headquarters Reimbursable SAAs), the NASA CFO (for Headquarters Funded SAAs), or the Center CFOs (for Center Reimbursable and Funded SAAs).

   - These estimates are the basis for NASA financial management officials to ensure that proposed NASA funding is available and for NASA signing official to determine whether proposed funding and resource to be contributed by NASA are fair and reasonable in light of NASA program risks, the corresponding benefits to NASA, and the funding and resources to be contributed by the partner.

4. The Facilities Engineering and Real Property (FERP) Division for any SAA that includes the use of NASA buildings and facilities by the SAA Partner. Discussions with the Center facilities office, as appropriate will facilitate FERP's review process.

   - Early coordination is critical to ensure the SAA provides appropriate levels of use and includes any required provisions. For example, if a facility is to be provided to a Partner under an exclusive-use arrangement, a separate facility use agreement is required.

Space Act Agreement Recordkeeping

The Agreement Manager is responsible for uploading the signed version of the SAA in SAAM, or in the alternative, be able to verify the location of all final, signed copies of Agreements under their jurisdiction. For International Agreements and Agreements with other U.S. Federal agencies, the Agreement Manger also must provide a copy of the executed Agreement to the Assistant Administrator for External Relations.[17]

1.4. NONREIMBURSABLE AGREEMENT

Nonreimbursable SAAs involve "NASA and one or more partners in a mutually beneficial activity that furthers NASA's mission, where each party bears the cost of its

[17] NPD 1050.1H (5)(f).

participation and there is no exchange of funds between the parties."[18] They permit NASA to offer time and effort of personnel, support services, equipment, expertise, information, or facilities. It is appropriate to use a nonreimbursable SAA where NASA and its partner(s) are performing activities collaboratively for which each is particularly suited and for which the end results are of interest to both parties. Since nonreimbursable SAAs involve the commitment of NASA resources, the respective contributions of each partner must be fair and reasonable under the circumstances. Each NASA signing official is responsible for determining that each SAA within his/her area of jurisdiction has been properly reviewed consistent with NPD 1050.1H. Before executing an SAA, the NASA signing official is responsible for determining that the partner's contribution provides an adequate *quid pro quo* when compared to NASA's contribution. Therefore, in accordance with NPD 1050.1H, before NASA may enter a nonreimbursable SAA, a cost estimate of the value of the NASA resources to be committed under the SAA must be prepared so that the signing official has a basis for determining that the proposed contribution of the partner is fair and reasonable when compared to the NASA resources to be committed, NASA program risks, and corresponding benefits to NASA. To make such a determination, obtaining an estimate of the value of the potential partner's resources to be committed under the SAA is ordinarily appropriate. *See* section 2.2.6 herein for additional guidance.

All nonreimbursable SAAs with domestic, non-governmental entities should be titled "Nonreimbursable Space Act Agreement." At the request of a U.S. state or Federal Government entity, a Nonreimbursable SAA with that entity may be titled "Memorandum of Agreement" (MOA) or "Memorandum of Understanding" (MOU). Additionally, in certain situations, specialized titles have been used to denote specific types of agreements (*see* sections 1.8 and 2.2.1 herein). The title of the agreement is not determinative. What is important is understanding the respective commitments and responsibilities of the parties.

1.5. REIMBURSABLE AGREEMENT

Reimbursable SAAs are agreements where NASA costs associated with the undertaking are reimbursed by the partner. A reimbursable SAA permits the partner to use NASA facilities, personnel, expertise, or equipment to advance the partner's own interests. NASA undertakes reimbursable SAAs when it has unique goods, services, or facilities, which can be made available to another party in a manner that does not interfere and is consistent with NASA mission requirements. All reimbursable SAAs are subject to the provisions of NASA financial management policy for determining, allocating, and billing costs. These requirements are contained in NASA Financial Management Requirements (FMR) Vol. 16, Reimbursable Agreements. Additionally, before a reimbursable SAA is executed, a cost estimate for the undertaking must be prepared and reviewed by the NASA Director for Headquarters Operations (for Headquarters Agreements) or Center CFOs (for Center Agreements).

[18] NPD 1050.1H

Reimbursable SAAs with, or for the benefit of, foreign entities need to be coordinated with, and receive the concurrence of, the NASA Headquarters Office of External Relations and the relevant Mission Directorate(s). Such reimbursable agreements must advance one or more of NASA's objectives as described in the Space Act. In addition, among other requirements, such reimbursable SAAs must meet one of 3 conditions: [1] Sustain or enhance facilities and lower operational costs for current and future needs of NASA's missions; [2] Sustain or enhance skills that are or are projected to be needed to support NASA's mission; [3] Sustain or enhance a functional area not adequately funded by NASA programs but required for current or future support of NASA's missions.[19]

Because NASA typically does not share the benefits of reimbursable use of NASA facilities (*e.g.,* sharing in intellectual property or data rights)[20], the partner is generally charged full cost for the activity. However, NASA has statutory authority under the Space Act to provide reimbursable services without recovering full cost *(i.e.*, partial reimbursement). For example, facilities may be offered at market-based pricing or on another basis in accordance with NASA financial management policies.

Also, if NASA is obtaining rights to intellectual property or data or some other benefit, there is, at a minimum, a presumptive NASA interest that may justify NASA's acceptance of reimbursement for less than the full cost of its activities performed under the SAA (*i.e.*, partial reimbursement). In such cases, as with nonreimbursable agreements, the NASA signing official is responsible for determining that the partner's contribution provides an adequate *quid pro quo* when compared to NASA's contribution. Therefore, in accordance with NPD 1050.1H, before NASA may enter a reimbursable SAA where NASA is reimbursed for less than the full cost of its activities (partial reimbursement), the NASA signing official must determine that the proposed contribution of the partner is fair and reasonable when compared to the NASA resources to be committed, NASA program risks, and corresponding benefits to NASA. *See* section 2.2.6 herein for additional guidance.

Additionally, statutes other than the Space Act govern reimbursable agreements for specified types of facilities or activities. When such statutes prescribe the costs that may or must be recovered from the reimbursable customer, those requirements control rather than NASA's more general authority under the Space Act. Such separate statutory authority includes, but is not limited to, the Commercial Space Launch Act (49 U.S.C. § 70111), Commercial Space Competitiveness Act (15 U.S.C. § 5807), and the Unitary Wind Tunnel Plan Act (50 U.S.C. § 573) and 14 C.F.R. Part 1210 relating to wind tunnels.

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[19] NPD 1370.1, paragraph 1(f)

[20] Although NASA typically does not share the benefits of reimbursable use of NASA facilities, public benefit such as shared data rights or broad dissemination of the results is required where the reimbursable use of NASA facilities involves fundamental research or safety-related analysis and testing and is for the benefit of a foreign entity (even in cases where NASA's SAA Partner is a domestic entity). See discussion in 2.2.10.1. Data Rights related to NPD 1370.1.

A determination to charge less than full cost should: (1) be accomplished consistent with NASA's written regulations and policies, (2) articulate the market pricing analysis, benefit to NASA, or other legal authority that supports less than full cost recovery, and (3) account for recovered and unrecovered costs in accordance with NASA financial management policy.

Two threshold considerations must be satisfied before NASA can provide reimbursable services. The proposed activity must: (1) be consistent with NASA's mission and (2) involve facilities or services not reasonably available on the U.S. commercial market from another source.

The second element of the above policy is grounded in statute and Executive Branch policy directed at avoiding competition by the Federal Government with the private sector. For example, the U.S. National Space Policy (August 31, 2006) directs the Federal Government to use commercial capabilities and services to the maximum practical extent and to refrain from conducting activities that preclude, deter, or compete with U.S. commercial space activities, unless required by national security or public safety. The Commercial Space Competitiveness Act (15 U.S.C. § 5807) states that the Government, including NASA, may allow non-Federal entities to use space-related facilities on a reimbursable basis if equivalent commercial services are not available on reasonable terms. Thus, legal or policy considerations may affect the circumstances in which the Agency can make its facilities or services available if commercial services are otherwise available.[21]

An example of unacceptable competition with the private sector would occur if NASA were requested to review a company's engineering plans for soundness and technical feasibility, a service provided by a number of commercial entities. Thus, as a general matter, where NASA is requested to provide a service that it obtains for itself through a contract with a private firm, it should decline to provide that service under a reimbursable SAA. Exceptions, however, do occur. For example, if NASA has contracted for a service such as training and another agency or entity wants to participate in that training, then a reimbursable SAA may be used. Another example could involve contracting activities that are expressly required as a condition of cooperation with an international partner pursuant to an international agreement. Any contemplated exceptions must be coordinated with the Office of the General Counsel or Chief Counsel, as appropriate.

More broadly, the structuring of reimbursable SAAs often involve fiscal, legal, and policy issues that require substantial involvement of the offices of the NASA CFO (for Headquarters Agreements) or Center CFOs (for Center Agreements), as well as the Office of the General Counsel or Chief Counsel, as appropriate. Thus, early consultation with these offices is recommended.

[21] These considerations also would generally prohibit NASA from acting as a purchasing agent or broker on behalf of a non-Federal party for the acquisition of commercially available goods or services.

1.6. INTERNATIONAL AGREEMENT

International SAAs are Nonreimbursable SAAs or Reimbursable SAAs in which the partner is a legal entity that is not established under a state or Federal law of the United States and includes a commercial, noncommercial, or governmental entity of a foreign sovereign or a foreign person.[22] An International Agreement is used by NASA to establish bilateral or multilateral arrangements to conduct aerospace activities with foreign governments, foreign governmental entities, international organizations, foreign entities, or foreign persons. One category of International Agreements merits special attention – executive agreements. NASA is required by the Case-Zablocki Act (1 U.S.C. § 112(b)) and its implementing regulations (22 CFR Part 181) to consult with the State Department with respect to each proposed International Agreement with a foreign government, foreign governmental entity, or international organization, that is "significant" and intended to be binding under international law. State Department authorization to negotiate and conclude international agreements is provided through its "Circular 175 process." This process requires State Department coordination of the draft agreement with other interested U.S. Government agencies. The Act and regulations further require that the State Department report each such international agreement to Congress within 60 days after its entry into force.

NPD 1360.2A: "Initiation and Development of International Cooperation in Space and Aeronautics Programs" provides specific policy and procedural guidelines for entering into international cooperative agreements. Specific guidance regarding International Agreement provisions and the procedures and practice regarding formation of International Agreements is set forth in Chapter 4.

1.7. FUNDED AGREEMENT

Funded SAA are agreements under which appropriated funds are transferred to a domestic partner to accomplish an Agency mission. Funded SAAs should only be used when the Agency objectives cannot be achieved through any other agreement instrument, such as a Federal procurement contract, a Grant or Cooperative Agreement under the Federal Grants and Cooperative Agreements Act of 1977 (Chiles Act), or a reimbursable or nonreimbursable SAA. Prior to using a funded SAA, the Center Director or Mission Directorate Associate Administrator must determine, in consultation with the Office of the General Counsel or Chief Counsel, as appropriate, and the Chief Financial Officer, that a funded SAA is the appropriate legal instrument for the activity. Additionally, in accordance with NPD 1050.1H, before NASA may enter into a funded SAA, a cost estimate of the funding and, as appropriate, the value of any other NASA resources to be committed under the SAA, must be prepared and reviewed by the NASA CFO (for Headquarters Agreements) or Center CFOs (for Center Agreements) so that the NASA signing official has a basis for determining whether NASA's proposed contribution is fair and reasonable when compared to NASA program risks, corresponding benefits to NASA, and the funding and resources to be contributed by the partner.

[22] NPD1050.1H (1)(d).

1.8. SPECIALIZED ACTIVITIES AGREEMENT TITLES

Within NASA, certain SAAs have evolved to denote specific types of activities that are commonly known by descriptive names and may provide a useful template for drafting a new SAA. These agreement types authorize either reimbursable or nonreimbursable activities and, as such, are subject to the policies and requirements applicable to their respective agreement categories. The following list of current or previously used agreement types is not exhaustive nor is NASA restricted in its use of descriptive agreement titles.

1.8.1. UMBRELLA AGREEMENT (ANNEX): provides a mechanism for NASA and a Partner to agree to a series of related or phased activities using a single governing instrument that contains all common terms and conditions, and establishes the legal framework for the accompanying Annexes. Individual tasks are implemented through Annexes adopting the terms and conditions of the Umbrella Agreement and adding specific details for each task. For example, an Umbrella Agreement may be advisable where the parties anticipate repeated activities performed under an SAA, such as repetitive testing or analysis, but have not yet determined the extent of such activities. The benefit of using an Umbrella Agreement is that it allows the parties to proceed with initial tasks and add additional related tasks as the activity progresses, without requiring an additional SAA or a formal modification to the underlying Umbrella Agreement. An Umbrella Agreement with accompanying Annexes also may be appropriate when a decision about whether to proceed with later-planned partnership activities depends on the results of earlier activities. In that case, the scope of the project would be defined in the Umbrella Agreement providing that the earlier activities are defined in an initial Annex, with later activities added through additional Annexes, as warranted.

Each Annex should be limited to those elements of the SAA, which would appropriately vary from task to task – this could include funding levels, specific responsibilities, milestones and schedules, responsible technical representatives, or identification of affected NASA facilities. It is not appropriate, however, to use Annexes to modify the terms of the Umbrella Agreement itself. An Umbrella Agreement should not be used if all anticipated Annexes cannot be carried out under a single set of terms and conditions. Similarly, an Annex should not be added to an Umbrella Agreement if that Annex would require modification to the Umbrella Agreement to comply with this Guide. For example, if an Annex requires that the intellectual property or liability clauses in the Umbrella Agreement be modified to accommodate the planned task, then a separate SAA would be necessary to accommodate that particular task. In addition, it is not appropriate to execute Annexes for unrelated activities under a single Umbrella Agreement. For example, conducting a series of cosponsored educational workshops using Annexes under a nonreimbursable Umbrella Agreement would be appropriate where the workshops were planned to be conducted under the same terms and conditions as defined in the Umbrella Agreement. However, it would not be appropriate to put an Annex in place for a cosponsored educational workshop and for a collaborative development activity under the same nonreimbursable Umbrella Agreement because of the different legal terms that would apply to the two types of activities. Questions regarding whether a single Umbrella Agreement will support the range of activities contemplated with a

particular partner should be referred to the HQ Office of General Counsel or Center Office of Chief Counsel, as appropriate.

Umbrella Agreements and accompanying Annexes are subject to the requirements that apply to SAAs generally. These requirements include:

1. Each Umbrella Agreement should be designated as either reimbursable or nonreimbursable. Because the basic terms and conditions of reimbursable SAAs are different from those of nonreimbursable SAAs, it is not appropriate to put a reimbursable Annex under a nonreimbursable Umbrella Agreement, or vice versa. If the planned activities to be implemented under the Umbrella Agreement will require both reimbursable and nonreimbursable terms, separate SAAs are required for the reimbursable and nonreimbursable activities. (Partially reimbursable Umbrella Agreements are treated as reimbursable SAAs wherein NASA has agreed to waive certain costs. See Sec. 1.5.)
2. Each executed Umbrella Agreement must include at least one executed Annex. This is required to satisfy the requirements of NPD 1050.1H(e) which specifies that all SAAs must include responsibilities or performance milestones that are stated with sufficient clarity to support preparation of cost estimates, sound management planning, and efficient SAA administration.
3. Each Annex under an Umbrella Agreement is subject to the same reviews and approvals (including the preliminary abstract review, if applicable) as the initial Umbrella Agreement.
4. Each Umbrella Agreement and Annex must have a designated Agreement Manager who is responsible for the administration of the Agreements as specified in NPD 1050.1H and section 1.3 of this Guide.
5. Each nonreimbursable Annex must be based on an appropriate quid- pro-quo (See Sec. 1.4) and each reimbursable Annex must include an appropriate cost estimate. (See Sec. 1.5.)
6. Each Umbrella and Annex must be signed by a responsible Signing Official as identified in NPD 1050.1H.

The approach for Umbrella Agreements and Annexes are generally the same as those entered into with private parties. Therefore, the guidance and clauses in Chapter 2 should be utilized, unless the subject area is separately discussed, below. Each Umbrella Agreement should include the standard Agreement Sample Clauses provided in Chapter 2 unless a specific Umbrella Agreement Sample Clause is provided: Purpose and Implementation (sample clause 2.2.3.2), Responsibilities (sample clause 2.2.4.3), Schedule and Milestones (sample clause 2.2.5.2), Financial Obligations (sample clause 2.2.6.3, for reimbursable SAAs only), and Right to Terminate (sample clauses 2.2.15.4 and 2.2.15.5).

Annexes should include only the following clauses: Title (sample clause 2.2.1.3), Responsibilities (sample clause 2.2.4.4), Schedule and Milestones (sample clause

2.2.5.3), Financial Obligations (sample clause 2.2.6.4, for reimbursable SAAs only), Term (sample clause 2.2.14.2), Technical Points of Contact (sample clause 2.2.17.2), Loan of Government Property (sample clause 2.2.24, if applicable) and Signatory Authority (sample clause 2.2.26).

1.8.2. TECHNICAL EXCHANGE AGREEMENT (TEA)*:* provides a partner access to substantial amounts of publicly available information on an ongoing basis, for a specified period of time and in a particular area of interest, without having to file a request under the Freedom of Information Act (FOIA). TEAs are frequently used by the partner to assess the desirability of entering into an SAA with NASA in the future.

1.8.3. LAUNCH SERVICES AGREEMENT (LSA): provides the terms under which a payload or instrument can be flown on the Space Shuttle or a NASA expendable launch vehicle.

1.8.4. SPACE STATION UTILIZATION AGREEMENT (SSUA): provides for the sale or barter of utilization allocations for the Station. These agreements are generally with another ISS Partner or Cooperating Agency, or other foreign or domestic entity. Examples of resources that may be transferred pursuant to an SSUA include, but are not limited to, crew time, access to experiment modules, accommodation of equipment in U.S. facilities, and other research opportunities. All SSUAs must be consistent with the ISS Inter-Governmental Agreement (IGA), applicable MOUs, and other implementing arrangements.

1.8.5. SPACE SYSTEMS DEVELOPMENT AGREEMENT (SSDA): provides first-time entrants in space launch services at a reduced price. Under NASA policy, only U.S. domestic companies are eligible for these arrangements, which include special provisions applicable to the development phase of the new venture. Such special provisions, which are incorporated into a launch services agreement, might include a deferred payment schedule, special access to facilities, or a waiver of late fees.

1.8.6. JOINT ENDEAVOR AGREEMENT (JEA): provides a U.S. entity that is developing a new space process or product access to NASA facilities or services at a reduced price. It is used primarily with companies that have committed resources and are in active product development stages. The JEA is a cooperative working arrangement under U.S. law that gives these firms access to NASA facilities and services, and, in return, NASA receives the right to use the data resulting from the commercial research efforts for its own use.

1.8.7. LOAN OF EQUIPMENT: provides a mechanism for NASA to borrow or lend equipment. The loan agreement should identify the collaborative area of interest, include the respective roles and responsibilities of each party, include a list of the items to be provided, specify the duration of the loan, and impose certain obligations commonly found in a loan agreement, including the care and return of lended hardware. Sometimes, the terms of the loan may be included in an SAA covering a collaboration for which the

equipment loan is merely one element of the respective roles and responsibilities of NASA and the partner (*see* Sec. 2.2.24).

1.8.8. REIMBURSABLE TRAVEL: provides for reimbursement to NASA for travel and subsistence of NASA personnel supporting an outside party's activities. Pursuant to NPD 9710.1T, certain delegated officials are authorized to enter into such reimbursable arrangements when it is determined to be in the best interests of NASA. The actual reimbursement procedures to be followed are contained in FMM 9700, Chapter 301. These reimbursements must be distinguished from gifts of travel and travel expenses from foreign governments which must be accepted and reported in accordance with 5 U.S.C. § 7342. Another type of travel reimbursement to be distinguished from reimbursable travel under an SAA is reimbursement of travel and related expenses with respect to attendance at a meeting or similar function that must be accepted and reported in accordance with 31 U.S.C. § 1353 and implementing regulations found at 41 C.F.R. Part 304. Under this authority, "meeting or similar function" means a conference, seminar, speaking engagement, symposium, training course, or similar event sponsored or co-sponsored by a non-Federal source that takes place away from the employee's official duty station. Because of sensitive concerns surrounding payment of travel and gift rules, these agreements should be coordinated with NASA's ethics officials in the Office of the General Counsel or Chief Counsel, as appropriate.

1.8.9. SOFTWARE USAGE AGREEMENT (SUA): provides a mechanism for NASA HQ or a NASA Center authorizing the release and use of software created by or for NASA. External release of NASA software must comply with NPR 2210. The SUA is the legal document issued by NASA that defines the terms and conditions of release (including any restrictions on use and disclosure of the software). An SUA is a unilateral agreement, formed by the exchange of a promise (recipient's promise to abide by the terms of the SUA) for an act (NASA's transfer of software to the recipient), that binds the recipient to certain stipulations in order to receive software from NASA. The SUA must be signed or otherwise agreed to (*e.g.*, click wrap license) by the recipient before NASA may provide the software to the recipient.

1.9. NON-AGREEMENTS

NASA personnel often reach mutual understandings with non-NASA parties that are intended to document programmatic objectives and are important to the execution of joint activities. These understandings are sometimes called "agreements" or "program agreements." Some even describe or anticipate the provision of goods or services. Examples include:

- Letter of Intent
- Protocol
- Agreement in Principle
- Technology Plan
- Program Plan
- Action List

- Meeting Minutes
- Working Group Minutes

Such non-binding "pre-agreements" or program understandings may become binding if they are incorporated by reference in an SAA or if an existing SAA clearly authorizes managers, points of contact, or other NASA officials to conclude legally binding subordinate agreements. Otherwise, they are generally not legally binding and should not be portrayed as having legal effect. If an agreement has not been concluded in accordance with appropriately delegated authority under NPD 1050.1H,[23] it may not be enforceable. It is not possible for an individual without appropriate authority to create a legally binding agreement.[24]

[23] See Sec. 1.1 of this Guide.

[24] Note: The concept of "apparent authority," an element of the law of Agency, does not apply to federal agreements and contracts. An official must have actual authority to create legal obligations for a federal agency.

APPENDIX 1. AGREEMENT QUESTIONNAIRE

1. OVERVIEW

The following annotative Agreement Questionnaire is provided for your reference. It is organized by general topic. The general topics of the Agreement Questionnaire are: Proper Legal Instrument, Administrative, Financial, Liability and Mishap Investigations, and Intellectual Property and Data Rights. *(References listed with the Questions below refer to sections in this Guide)*.

2. QUESTIONNAIRE

2.1 Proper Legal Instrument

The answers to the questions in this subsection will be forwarded to the cognizant attorney in the Office of General or Chief Counsel who will determine if an SAA is the proper legal instrument for the proposed activity.

2.1.1 Does the proposed activity require a commitment of NASA resources (including personnel, funding, services, equipment, expertise, information, or facilities)? *(Reference: Section 1.2, "Space Act Agreement Defined")*

Rationale/Comments: SAAs may only be used when the Agency is not otherwise required to use a procurement contract, grant or cooperative agreement to achieve the Agency's objective.[25] An SAA is required any time NASA resources (personnel, funding, services, equipment, expertise, information or facilities) will be committed to a project. Conversely, if there is no requirement for the commitment of NASA resources, an SAA is generally not required.

2.1.2 Is there a demonstrable NASA mission (e.g., program requirement) or specific statutory authority related to the proposed activity? If yes, please identify. *(Reference: Sections 1.1, 1.4, 1.5, and 1.6, "Authority and Policy," "Nonreimbursable Agreement," "Reimbursable Agreement," and "Funded Agreement," respectively).*

Rationale/Comments: NASA uses its "Other Transactions" authority to enter into a wide range of SAAs with a variety of entities to advance NASA's numerous mission and program objectives as well as implement specific statutory authority, such as those described in Section 1.5, fifth paragraph. The degree of synergy between the proposed activity and the relevant NASA mission can be used to evaluate NASA's interest in the activity and, in some circumstances, determine the appropriate level of reimbursement. If there isn't a demonstrable NASA mission or specific statutory authority related to the activities of the proposed SAA, NASA should (in all likelihood) not become involved in the proposed activity. Any interest in pursuing an SAA under those circumstances requires coordination with the Office of General/Chief Counsel as soon as possible.

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[25] The use of a procurement contract, grant, or cooperative agreement is required under circumstances provided in the Federal Grant and Cooperative Agreements Act of 1977 (Chiles Act), 31 U.S.C. § 6301 *et seq*.

2.1.3 Does this project continue an effort previously performed or currently performed under a preexisting arrangement with a Partner? If yes, please identify the instrument(s) (e.g., contract, grant, cooperative agreement, or SAA).

Rationale/Comments: If the proposed activity was originally performed under a preexisting legal instrument, it may be advisable to use the same instrument (if the instrument is still active) or the same type of legal instrument (if the instrument is not active) for the proposed activity.

2.1.4 Will NASA be involved in the performance of the proposed SAA?

Rationale/Comments: For Fully Reimbursable SAAs, Partially Reimbursable SAAs, and Nonreimbursable SAAs, NASA should be involved in the performance of the proposed SAA activities. For the purpose of this question, lending NASA equipment or "leasing" of NASA property constitutes NASA involvement. If NASA is not involved in performance, a procurement contract or grant should be strongly considered. In very limited circumstances, a funded SAA may be the proper instrument.

2.1.5 Does NASA require the delivery of any item (e.g., service, hardware, software, composition) under the proposed SAA to perform its mission?

Rationale/Comments: If NASA requires an item to perform its mission, a procurement contract is strongly preferred based on the Competition in Contracting Act (CICA), as well as guiding principles in the Federal Grants and Cooperative Agreement Act of 1977, and the National Space Policy. Alternatively, if the delivery of an item is related to advanced or alternate research and development in that the item is not baselined in NASA's mission plans, an SAA becomes a more viable option.

2.1.6 Are the proposed NASA contributions unique to NASA, i.e., developed in-house and not generally available on reasonable terms from the commercial market from any source (including NASA contractors)?
(Reference: Section 1.5, "Reimbursable Agreement," and Section 4.4, "International Reimbursable Agreements")

Rationale/Comments: As a matter of policy, NASA does not compete with the private sector. This policy is grounded in statute and Executive Branch policy directed at avoiding competition by Federal agencies with the private sector. However, there are exceptions. For further guidance, refer to Section 1.5, "Reimbursable Agreement."

2.1.7 If the proposed SAA is Nonreimbursable, is the Partner's contribution adequate (fair and reasonable) compared with NASA's contribution (taking into account full cost accounting methods)?
(Reference: Section 1.4, "Nonreimbursable Agreement")

Rationale/Comments: The answer to this question addresses the requirement for a quid-pro-quo arrangement for Nonreimbursable SAAs.

2.1.8 In the foreseeable future, could the Partner bid on a procurement contract with the Federal Government related to the proposed activity?
(Reference: Section 1.3, "Agreement Formation Process")

Rationale/Comments: Organizational Conflict of Interest (OCI) issues can arise if a company gains an unfair competitive advantage in connection with a future Federal Government acquisition (see FAR Subpart 9.5) without the consideration of mitigation plans. If the answer to this question is 'yes,' OCI issues should be analyzed with the assistance of the Office of Procurement or Office of General or Chief Counsel.

2.1.9 If deliverables are part of the proposed SAA, are the deliverables commercially available and ready for NASA's use, or do the deliverables require additional development?
(Reference: Section 1.5, "Reimbursable Agreement")

Rationale/Comments: If the deliverables are commercially available, a procurement contract is strongly preferred based on the Competition in Contracting Act (CICA), as well as guiding principles in the Federal Grants and Cooperative Agreement Act of 1977, and the National Space Policy.

2.1.10 If deliverables (to be developed) are part of the proposed SAA and a deliverable is a product, does the product have commercial, non-NASA uses?

Rationale/Comments: First, this question assumes deliverables are not currently commercially available. Second, this question assumes that deliverables will be developed as part of the proposed SAA activities. If the deliverables (to be developed) have commercial, non-NASA uses, this fact would help support an SAA. Alternatively, if the deliverables (to be developed) only have a NASA use, a procurement contract is strongly preferred. The prime motivation of the SAA Partner is also a relevant consideration (i.e., is the Partner's business plan focused on selling commercial products rather than winning NASA procurement contracts?).

2.2 Administrative Questions

2.2.1 Please provide a short, descriptive title for the proposed SAA.
(Reference: Section 2.2.1, "Title")

2.2.2 What is the full corporate name of each Partner?
(Reference: Section 2.2.2, "Authority and Parties")

2.2.3 If applicable, what is the division name of each Partner?
(Reference: Section 2.2.2, "Authority and Parties")

2.2.4 What is the common, shortened name of each Partner?
(Reference: Section 2.2.2, "Authority and Parties")

2.2.5 What is the complete street address of each Partner?
(Reference: Section 2.2.2, "Authority and Parties")

2.2.6 What are the city, state and zip code of each Partner?
(Reference: Section 2.2.2, "Authority and Parties")

2.2.7 What type of company is each Partner? (e.g., Large entity, College/University, Government entity, Non-profit, Small Business)
(Reference: Section 2.2.2, "Authority and Parties")
Rationale/Comments: Alternative liability, insurance, patent and invention rights, and data rights clauses depend on this information.

2.2.8 What is the nationality of each Partner? (e.g., Domestic or Foreign)
(Reference: Section 2.2.2, "Authority and Parties")
Rationale/Comments: This question will help to determine if the proposed SAA should be an International Agreement.

2.2.9 Please provide an explanation of what the SAA proposes to accomplish. - Begin the paragraph with "Center Name and Partner Name wish to... ". e.g., What is the purpose and general scope of the activities planned, the subject of any testing, facilities/equipment to be used, and the objectives to be achieved?
(Reference: Section 2.2.3, "Purpose")

2.2.10 Please provide a list of Partner Responsibilities and a list of [NASA Center] Responsibilities. Include tasks, facility usage, equipment usage, deliverables (including data deliverables), etc. Be as specific as possible.
(Reference: Section 2.2.4, "Responsibilities")

2.2.11 Please list the milestones for the proposed SAA to be accomplished by specific dates (i.e., completion dates) agreed to by the Parties. Milestones should represent discrete pieces of work that can be objectively and individually evaluated. It is recommended that completion dates are linked to the execution date of an SAA or another significant milestone date (e.g., 4 months after the execution date).
(Reference: Section 2.2.5, "Schedule and Milestones")

2.2.12 Will NASA lend government-owned property as part of the proposed SAA? If yes, describe the property that will be lent during the proposed SAA. Please include the appropriate NASA Tag numbers, serial numbers, etc, when appropriate.
(Reference: Section 1.8.6, "Loan of Equipment" and Section 2.2.24, "Loan of Government Property")

2.2.13 Does the proposed SAA require exclusivity?
(Reference: Section 2.2.8, "Nonexclusivity")
Rationale/Comments: As a general rule, NASA's SAAs with private entities should be on a nonexclusive basis – that is, all private entities should have equal access to the NASA resource. However, in limited circumstances, exclusivity may be appropriate. If exclusivity is contemplated, coordination with the Office of General or Chief Counsel is required. Procedures for including exclusivity provisions in an SAA are defined in Section 2.2.8.

2.2.14 How much time will be needed to accomplish the purpose of the SAA?
Note: The term of the SAA must be consistent with the schedule and milestones.

(Reference: Section 2.2.14, "Term of Agreement")

Rationale/Comments: The term of an SAA should be determined based on the requirements of the planned activity. As a general rule, an SAA should not exceed 5 years. If a longer commitment is essential to the fundamental objectives of the SAA, then the Office of General or Chief Counsel should be consulted as early in the SAA development process as possible.

2.2.15 Please provide information pertaining to the management points of contact (e.g., name, address, organization, phone number, email address) for NASA and each Partner.
(Reference: Section 2.2.19, "Management Points of Contact")

2.2.16 Please provide the name and title of each signatory, wherein the name and title has been personally verified by each signatory.
(Reference: Section 2.2.25, "Signatory Authority")

2.2.17. Does the proposed SAA require a high degree of certainty from the Partner that NASA, the Partner, or both will execute the proposed responsibilities?

Rationale/Comments: Sample Clause 2.2.15.3 is only used in very rare circumstances, for example, when the Partner is funding infrastructure improvements to NASA property for a commercial business that requires upfront investments on the part of the Partner. If NASA required unilateral termination rights, which is generally provided in its SAAs, the Partner would be unable to build its business and raise capital. The question to be asked in deciding whether to use Sample Clause 2.2.15.3 is whether the benefit to NASA justifies a significant limitation of its termination rights as found in that clause.
(Reference: Section 2.2.15, "Right to Terminate," Clause 2.2.15.3, "Reimbursable Agreement Requiring High Certainty of Support Sample Clause (Right to Terminate)," and Section 2.2.18, "Dispute Resolution.")

2.3 Financial Questions

2.3.1 Does the SAA require NASA pay a Partner? (How much is proposed?)
(Reference: Section 2.2.6, "Financial Obligations" and Section 1.7, "Funded Agreement")

Rationale/Comments: The answer to this question will determine if the proposed agreement is a funded SAA, which is only rarely used by NASA. If NASA funding is proposed, coordination with the Office of General or Chief Counsel is required as soon as possible.

2.3.2 What is the total cost of the proposed SAA to NASA? Note: Total cost is defined as all costs unique to a project, all traceable common costs, and all general and administrative costs that can be reasonably charged.
(Reference: Section 1.5, "Reimbursable Agreement" and Section 2.2.6, "Financial Obligations")

Rationale/Comment: The answer to this question will aid in a quid-pro-quo analysis, if applicable, as well as a full cost vs. market-based accounting analysis. NASA

has statutory authority under the Space Act to provide reimbursable services without recovering full cost (i.e., partial reimbursement). For example, facilities may be offered at market-based pricing or another basis in accordance with NASA financial management policies.

2.3.3 Is the proposed SAA nonreimbursable? If yes, go to Question 2.3.7. If no, go to Question 2.3.4.
(Reference: Section 2.2.6, "Financial Obligations," Section 2.2.9.1, "SAAs for Shared Benefits--Cross-Waiver and Flow Down," "Section 2.2.10, "Intellectual Property Rights")

Rationale/Comments: Whether or not a proposed SAA is fully reimbursable or nonreimbursable aids in the determination of which Liability and Intellectual Property provisions are appropriate.

2.3.4 Is the proposed SAA fully reimbursable? If yes, go to Question 2.3.6. If no, go to Question 2.3.5.
(Reference: Section 2.2.6, "Financial Obligations," Section 2.2.9.1, "SAAs for Shared Benefits--Cross-Waiver and Flow Down," "Section 2.2.10, "Intellectual Property Rights")

Rationale/Comments: Whether or not a proposed SAA is fully reimbursable aids in the determination of which Liability and Intellectual Property provisions are appropriate.

2.3.5 How much of NASA's total cost will the Partner reimburse?
(Reference: Section 2.2.6, "Financial Obligations")

Rationale/Comments: Refer to Section 2.2.6 of this SAAG for guidelines associated with the acceptance of less than full reimbursement by NASA.

2.3.6 Will the payment of the entire reimbursable amount be made in one lump sum? If no, list a payment schedule. Please verify that the scheduled payments add up to the total estimate above. Please note that work can only be performed after payment for that work is received.
(Reference: Section 2.2.6, "Financial Obligations")

2.3.7 What is the total cost of the proposed SAA activities for each Partner?
(Reference: Section 2.2.6, "Financial Obligations")

Rationale/Comments: The answer to this question will aid in a quid-pro-quo analysis, if applicable.

2.4 Liability and Mishap Investigation

2.4.1 If the activities involve the International Space Station or a launch activity, go to Question 2.4.6. If the activities do not involve the International Space Station or a launch activity, go to Question 2.4.2
(Reference: Section 2.2.9.1, "SAAs for Shared Benefits--Cross-Waiver and Flow Down")

Rationale/Comments: In SAAs for missions on the International Space Station (ISS) or launch activities for science or space exploration unrelated to the ISS, specific cross-waiver provisions are required as provided in 14 C.F.R. 1266. These activities include a wide range of design, transport, flight and payload activities covered under "protected space operations."

2.4.2 Do the proposed activities call for a sharing of substantive non-monetary benefits (i.e., will substantive, non-monetary benefits be provided to both NASA and Partner)? If yes, go to Question 2.4.6. If no, go to Question 2.4.3.
(Reference: Section 2.2.9.1, "SAAs for Shared Benefits--Cross-Waiver and Flow Down" and Section 2.2.10, "Intellectual Property Rights")

Rationale/Comments: If a proposed SAA is nonreimbursable, sharing of substantive, non-monetary benefits is generally per se considered to exist. Conversely, if a proposed SAA is fully reimbursable, sharing of substantive, non-monetary benefits is generally per se considered to not exist. If a proposed SAA is partially reimbursable, one should ask the question, "What's in it for NASA?" To answer this question, consider the following: whether non-monetary benefits would exist (e.g., such as cross-fertilization of knowledge, shared data rights, shared intellectual property rights, patent licenses, etc.); the percentage of the partial reimbursement (e.g., 90% reimbursement could be an indication of no sharing of substantive benefits and 5% reimbursement could be an indication of a sharing of substantive benefits); and whether the proposed SAA is for the primary or exclusive benefit of the Partner (i.e., the non-NASA party).

2.4.3 Is there a reasonable likelihood of occurrence of significant personal injury to third parties or significant damage to third party property?
(Reference: Section 2.2.9.3, "Insurance Coverage")

Rationale/Comments: The subject question addresses two issues related to "third party" damage: 1) significant damage to third party persons and 2) significant damage to third party property. A "third party" may include a NASA or NASA-contractor employee suing in his or her individual capacity.

- First, the likelihood of occurrence must be at least a "reasonable likelihood of occurrence." The "likelihood of occurrence" is a percentage from 0-100%, however, it is not necessary to quantify the likelihood of occurrence. Although there isn't a bright line rule for what constitutes a "reasonable likelihood of occurrence," as a general rule, any likelihood of occurrence that isn't a "low" percentage or rare event is deemed to be reasonably likely to occur.
- Second, the potential damage must be "significant." Damage, as used herein, is generally related to a monetary value. Again, there isn't a bright line dollar limit with respect to whether damage is significant or not.

The SAAG places the responsibility for determining whether the "likelihood of occurrence" is at least "reasonable" and whether the potential damage is "significant" on the NASA personnel involved with negotiating and executing a proposed SAA (and in particular, the primary responsibility is placed on the program or project office and the signing official in consultation with the cognizant attorney).

2.4.4 Is there a reasonable likelihood of occurrence of significant damage to high-value NASA property?

(Reference: Section 2.2.9, "Liability and Risk of Loss" and Section 2.2.9.3, "Insurance Coverage")

Rationale/Comments: This question has three components.

- The first component is that the likelihood of occurrence of the potential damage must be at least reasonably likely to occur. The likelihood of occurrence is a percentage from 0-100%, however, it is not necessary to quantify the likelihood of occurrence. Although there isn't a bright line rule for what constitutes a "reasonable likelihood of occurrence," as a general rule, any likelihood of occurrence that isn't a "low" percentage or rare event is deemed to be reasonably likely to occur.
- Second, the potential damage must be "significant." Damage, as used herein, is generally related to a monetary value. Again, there isn't a bright line dollar limit with respect to whether damage is significant or not. Section 2.2.9.3 provides the following consideration for potential property damage: the maximum potential for damage to property relative to the program's ability to repair.
- Third, any potential damage must be related to "high-value" NASA property. Examples of considerations for determining "value" include the monetary value and the critical nature of the property to NASA's programs and activities. The monetary value of the property and the monetary value of the potential damage to the property may be equivalent.

The SAAG places the responsibility for determining whether these three components exist, on the NASA personnel involved with negotiating and executing a proposed SAA (and in particular, the primary responsibility is placed on the facility manager and the signing official in consultation with the cognizant attorney). If the relevant NASA property has been determined as "low-value" or "medium-value," then the answer to the subject question is "no" even if there is a reasonable risk of significant damage.

2.4.5 If an insurance requirement is justified (for the non-NASA party), is it anticipated that an insurance waiver will be requested?
(Reference: Section 2.2.9.3, "Insurance Coverage," Last Bullet)

2.4.6 Is there a possibility of a serious accident or mission failure and the parties include non-U.S. Government personnel?
(Reference: Section 2.2.18, "Mishap Investigation")

2.5 Intellectual Property and Data Rights

2.5.1 Will the Partner perform work of an inventive type exclusively "for NASA" under the proposed SAA? If yes, go to Question 2.5.5. If no, go to Question 2.5.2.
(Reference: Section 2.2.10.3, "Invention and Patent Rights")

Rationale/Comments: Most SAAs do not involve work of an inventive nature being performed by the partner for NASA. Thus, NASA obtains no rights in inventions made solely by the partner under most SAAs. A case-by-case analysis is required to determine whether work to be performed by the partner under the SAA is being performed for NASA. The text, associated with the "Invention and Patent Section 305(a) Sample Clause" found in Section 2.2.10.3, contains considerations to aid the evaluator in determining the answer to this question. Considerations include: whether the proposed

activities are relate to a cooperative effort "with NASA" rather than a directed effort "for NASA; whether the proposed activities are for the primary or exclusive benefit of the non-NASA party; whether the proposed work is fully funded by NASA; whether the proposed activities are required to fulfill a NASA mission; whether the proposed activities involve research and development; and what is the prime motivation of the non-NASA party in terms of commercial aspirations or seeking future NASA business. Further, the evaluator is encouraged to seek consultation from an Intellectual Property attorney relative to a 305(a) analysis.

2.5.2 Is there a low probability that an invention may result due to the work conducted under the proposed SAA? In general, if research, experimental, developmental, engineering, demonstration, or design activities are to be carried out under the proposed SAA, there is generally a medium to high probability (i.e., not a low probability) that an innovation may result.
(Reference: Section 2.2.10.3, "Invention and Patent Rights")

Rationale/Comments: If the Partner is a commercial entity, the answer to this question will help determine if the Standard or Short Form Patent and Invention Rights clause should be used in the proposed SAA.

2.5.3 Is there a related NASA invention? If yes, please identify the related NASA invention (i.e., provide an invention disclosure case number, patent number, or both).
(Reference: Section 2.2.10.3, "Invention and Patent Rights," and Invention and Patent Rights Standard Form Sample Clause 2.2.10.3.2, Subsection 8)

2.5.4. Is the proposed SAA a reimbursable agreement with a foreign entity, or with a domestic entity but for the benefit of a foreign entity, i.e., could a foreign entity have access to and use of any deliverable items (including any data) resulting from the proposed reimbursable agreement by virtue of a contractual or other relationship (including common corporate ownership) with the proposed domestic partner?
(Reference: Section 1.5 Reimbursable Agreements, 2.2.10.2 Data Rights, and 4.4. International Reimbursable Agreement)

Rationale/Comments: Compliance with NPD 1370.1, Reimbursable Utilization of NASA Facilities by Foreign Entities and Foreign-Sponsored Research may require the use of Data Rights clause 2.2.10.1.3 for such reimbursable agreements.

2.5.5 If the Partner is a foreign governmental entity, is there any likelihood of joint development?
(Reference: Section 4.1 General Guidance [for agreements with Foreign Entities], Section 4.5.12, Intellectual Property)

2.5.6 Do the Parties intend to exchange all data without any use and disclosure restrictions? If yes, go to Question 2.5.9. If no, go to Question 2.5.7.
(Reference: Section 2.2.10.1, "Data Rights," Third Paragraph)

Rationale/Comments: In some circumstances, the parties may plan to exchange all data and information without any use and disclosure restrictions. Examples of such circumstances include SAAs involving non-technical activities such as strategic alliances,

educational or public outreach, or community or public affairs events. In such circumstances, the simplified Data Rights Sample Clause 2.2.10.1.4 should be used.

2.5.7 Is there any likelihood that existing proprietary data or sensitive information will be exchanged under the proposed SAA? If yes, go to Question 2.5.8. If no, go to Question 2.5.9.
(Reference: Section 2.2.10.1, "Data Rights")

Rationale/Comments: The general types of proprietary and sensitive information (including computer software) relevant in an SAA include the following: 1) third party proprietary information, 2) Government Sensitive But Unclassified (SBU) information, and 3) the Partner's proprietary information. In addition to Section 2.2.10.1 of this SAAG, guidance concerning Government SBU information can be found in NPR 1600.1A, Chapter 5.24.

2.5.8 Is there any known proprietary data or sensitive information (generally referred to as "background data")? If yes, obtain a list of the background data.
(Reference: Section 2.2.10.1, "Data Rights" and Data Rights Proprietary Data Exchange Addendum Sample Clause 2.2.10.1.2, Subsection 8)

2.5.9 (a) Do the activities under the proposed Agreement include fundamental research or analysis of raw data (*i.e.*, unanalyzed data usually of a scientific nature)?
(b) If yes, will there be a period of exclusive use of raw data for scientific analysis and first publication rights by one or more Principal Investigators (PIs)?
(c) If yes, identify the PI(s) and the exclusive use period (generally one year or less).
(Reference: Section 2.2.10.2, "Rights in Raw data generated Under the Agreement")

Rationale/Comments: Agreements related to research resulting from space science missions or analysis of space science satellite raw data may have some exclusive period for use of the raw data by PI(s). The period is generally a year or less. Agreements related to research resulting from earth science missions or analysis of earth satellite raw data is generally made widely available as soon as practicable after its acquisition and on-orbit calibration and validation.

2.5.10 Is there a need for the Partner to practice an invention claimed in an existing U.S. patent owned by a third party, or to reproduce, distribute, or prepare derivative works of, or perform or display publicly a copyrighted work owned by a third party? (rarely yes)
(Reference: Section 2.2.10.4, "Patent and Copyright Use: Authorization, Consent, and Indemnification")

Rationale/Comments: If the answer to this question is "yes," the cognizant NASA patent/intellectual property counsel must be consulted to determine whether the authorization and consent or indemnification clauses should be included to protect the U.S. Government financially from any possible future infringement claims.

CHAPTER 2. NONREIMBURSABLE AND REIMBURSABLE AGREEMENTS WITH DOMESTIC NONGOVERNMENTAL ENTITIES

2.1. GENERAL GUIDANCE

Consistency in approach to the drafting of SAAs promotes consistent treatment of similarly situated partners and helps expedite the review process within NASA. Accordingly, SAAs with nongovernmental entities should conform, to the extent practicable, to this specific form and should include the following sections, as appropriate, in the order presented.

2.2. AGREEMENT CONTENTS

One purpose of this Guide is to facilitate consistency among Centers, to the extent practicable, in the formation and organization of SAAs, and in the language and provisions of the SAA clauses. While not all SAAs will include all of the clauses listed below, the clauses included in any particular SAA should always retain the order provided below, the titles, and to the greatest extent possible, the clause language provided herein. Clause 25 is provided for Center or SAA specific clauses.

1. Title.
2. Authority and Parties.
3. Purpose.
4. Responsibilities.
5. Schedule and Milestones.
6. Financial Obligations.
7. Priority of Use.
8. Nonexclusivity.
9. Liability and Risk of Loss.
10. Intellectual Property Rights.
11. Use of NASA Name and Emblems and Release of Information to the Public.
12. Disclaimers.
13. Compliance with Laws and Regulations.
14. Term of Agreement.
15. Right to Terminate.
16. Continuing Obligations.
17. Management Points of Contact.
18. Dispute Resolution.
19. Mishap Investigation.
20. Modifications.
21. Assignment.
22. Applicable Law.
23. Independent Relationship.
24 Loan of Government Property.
25. Special Considerations.

26. Signatory Authority.

2.2.1. TITLE

SAAs are given a short title stating the type of agreement (nonreimbursable or reimbursable), the parties, and the agreement's purpose. Over the years, certain shorthand titles have been created, sometimes used differently at different NASA Centers, to describe more specifically the type of activity covered by the SAA. Examples include "Technical Exchange Agreement" and "Reimbursable Travel Agreement." The legal significance of an agreement is generally not affected by its title. What is significant, rather, is the nature of the particular commitments made by NASA and its partner.

2.2.1.1. Title (Nonreimbursable Agreement Sample Clause)

2.2.1.2. Title (Reimbursable Agreement Sample Clause)

2.2.1.3. Title (Annex Sample Clause)

2.2.2. AUTHORITY AND PARTIES

This section recites NASA's authority to enter into the SAA and identifies the parties by name and address.

2.2.2. Authority and Parties (Sample Clause)

2.2.3. PURPOSE

The purpose, often stated in one brief paragraph, succinctly describes why NASA is entering into the agreement. For all SAAs, this section should indicate the purpose and general scope of the planned activities, the subject of any testing, and objectives to be achieved. In addition, the purpose should include a description of the benefit to NASA and the partner. For fully reimbursable agreements, however, the purpose needs only to describe how the activity is consistent with NASA's mission.

2.2.3.1 Purpose (Sample Clause)

2.2.3.2 Purpose and Implementation (Umbrella Agreement Sample Clause)

2.2.4. RESPONSIBILITIES

This section describes the actions to be performed by each party to the SAA, including the type of effort, information, equipment, and personnel to be provided by each. It is in

carefully drafting and negotiating the responsibilities section that project and program managers can best use SAAs as management tools.

Generally, the responsibilities section is most helpful when it is divided into two subsections, one describing NASA's responsibilities and the other describing the partner's responsibilities. An SAA, however, with more than one partner is possible. Such multiparty SAAs raise special issues that require extensive revision to standard text, and therefore, early legal counseling is essential. For example, where an SAA allocates responsibilities among several entities, one party's failure to comply with the terms of the SAA may affect the obligations of the remaining parties. Moreover, multi-party SAAs risk placing NASA in a position of guaranteeing the performance of one of its partners or becoming involved in obligations running between other parties to the SAA.

In all cases, performance of each party's responsibilities is on a "reasonable efforts" basis. The degree of detail in the responsibilities section will vary depending on the nature of activities to be performed. However, the responsibilities described within the text of the SAA itself must contain sufficient detail to disclose both the core obligations of the parties and the nature of the resources to be committed. Sometimes it is advisable to include definitions of key terms relating to responsibilities where reasonable interpretation could lead to differing conclusions as to a word's meaning.

2.2.4.1. Responsibilities (General Sample Clause)

2.2.4.2. Responsibilities (Technical Exchange Agreement Sample Clause)

2.2.4.3 Responsibilities (Umbrella Agreement Sample Clause)

2.2.4.4 Responsibilities (Annex Sample Clause)

Note: Certain statutory and Executive Branch policies may restrict NASA's ability to make facilities and services available when such facilities and services may be available commercially.[26]

For complex activities, use of technical annexes, program implementation plans, or similar documents are generally recommended to specify in greater detail the manner in which the activities under the SAA are to be implemented. They afford program managers a mechanism for making adjustments as circumstances warrant, without having to amend the SAA itself. The activities specified in technical annexes and similar implementation plans, however, must be within the scope of the responsibilities as set forth in the SAA. If desirable, they can form part of the SAA if incorporated by reference in the text. Because they are not formal agreements, authority to sign such annexes or plans is not subject to the same delegation rules of NPD 1050.1H. The documents may therefore be signed by the responsible technical manager for each party concurrently with, or subsequent to, the SAA itself.

[26] *See* sections 1.5 and 2.2.6.

2.2.5. SCHEDULE AND MILESTONES

This section sets forth a planned schedule of key dates or events consistent with available information known at the time the SAA is executed. It documents the anticipated progress of the SAA's activities. Responsibilities (as set forth above) and performance milestones should be stated with sufficient clarity to support preparation of cost estimates, sound management planning, and efficient agreement administration.

2.2.5.1 Schedule and Milestones (Sample Clause)

2.2.5.2 Schedules and Milestones (Umbrella Agreement Sample Clause)

2.2.5.3 Schedules and Milestones (Annex Sample Clause)

2.2.6. FINANCIAL OBLIGATIONS

This section sets out both NASA's and the partner's contributions to the SAA to include funding and in-kind contributions (*e.g.*, goods and services) where appropriate.

In nonreimbursable SAAs, no funding is exchanged and each party supports its own participation in the SAA activity. The contribution of the partner must be fair and reasonable compared to NASA's contribution. Before a nonreimbursable SAA is executed, an estimate of the value of the NASA resources to be committed under the SAA must be prepared using cost accounting values computed in accordance with guidance issued by the Headquarters Chief Financial Officer. Estimates should be approved by the NASA Director for Headquarters Operations (for Headquarters Agreements) or Center CFOs (for Center Agreements). This estimate provides the NASA signing official a basis for finding that the proposed contribution of the partner is consistent with policy and represents an adequate *quid pro quo* when compared to NASA resources to be committed, NASA program risks, and corresponding benefits to NASA. *See* section 1.4 herein for additional guidance regarding nonreimbursable SAAs.

A nonreimbursable SAA must include a statement that no funds are to be transferred pursuant to the SAA. Moreover, every SAA should explicitly state that NASA's obligations are subject to the availability of Congressionally appropriated funds and other resources as determined by NASA. At times it might be appropriate to indicate that, where a determination is made that the transfer of funds in the future might be desirable, it will be implemented by a separate SAA or other instrument (e.g., contract, grant or cooperative agreement).

2.2.6.1. Financial Obligations (Nonreimbursable Agreement Sample Clause)

Under reimbursable SAAs, the partner pays NASA to provide services for the partner's benefit. The partner is usually required to reimburse NASA's full costs. However, the SAA may provide for less than full cost reimbursement (partial reimbursement) when: (1) a market-based pricing policy is applicable; (2) reimbursement is fair and reasonable when compared to the benefits NASA receives from the work; or (3) costs are prescribed by specific statutory authority other than the Space Act. A determination to charge less than full cost should: (1) be accomplished consistent with NASA's written regulations and policies; (2) articulate the market-based pricing analysis, benefit to NASA, or other legal authority that supports less than full cost recovery; and (3) account for recovered and unrecovered costs in accordance with NASA financial management policy. All reimbursable SAAs, regardless of whether full cost is recovered, are subject to NASA's financial management regulations for determining, allocating, and billing costs.

Before a reimbursable SAA is executed, a cost estimate for the undertaking must be prepared consistent with guidance from the Chief Financial Officer and must be reviewed by the NASA Director for Headquarters Operations (for Headquarters Agreements) or Center CFOs (for Center Agreements). The estimate should identify the specific elements of cost applicable to the work and specify which costs are required to be reimbursed. Additionally, before NASA may enter a Reimbursable SAA where NASA is reimbursed for less than the full cost of its activities performed under the SAA, the NASA signing official must determine that the proposed contribution of the partner is fair and reasonable compared to the NASA resources to be committed, NASA program risks, and corresponding benefits to NASA. *See* section 1.5 herein for additional guidance regarding reimbursable SAAs.

NASA must receive an amount sufficient to fund any reimbursable work (either in full or divided by task order) before it may begin work for under a reimbursable SAA, unless the agreement is with another Federal agency, or waiver of advance payment is otherwise authorized in NPD 1050.1H. Where NASA is fully funding some of its activities performed under a reimbursable SAA, NASA may begin those activities before other funds are received from the partner. Reimbursable orders from other Federal agencies may be paid upon billing instead of in advance, in accordance with financial management policy.

Note: Under very limited circumstances where hardship is demonstrated or legal restriction prohibiting advance payments is identified, a waiver may be requested in writing to allow payment after work has been performed by NASA. However, such exceptions should be limited to work that very clearly could be fully funded by NASA as part of its mission and funds are certified and allocated to account for costs that may accrue prior to the provision of funds by the partner. Such a waiver should be submitted as part of the approval process required for reimbursable SAAs and must be approved by the NASA CFO (for Headquarters Agreements) or Center CFOs (for Center Agreements).

2.2.6.2. Financial Obligations (Reimbursable Agreement Sample Clause)

2.2.7. PRIORITY OF USE

This section ensures that NASA does not become legally committed to perform the activities according to any schedule stated in the SAA, in the event other NASA priorities or interests arise. It provides that, in the event of a conflict in scheduling the NASA resources, NASA, at its sole discretion, may determine which usage takes priority.[27] However, the SAA may reflect current planned milestones or express the desire of the partner that activities occur at a specified time.

2.2.8. NONEXCLUSIVITY

As a general rule, NASA's SAAs with private entities should be on a nonexclusive basis, that is, all private entities should have equal access to the NASA resource. This helps avoid any appearance of NASA favoritism of one private party over another. However, where exclusive or partially-exclusive arrangements are necessary, competition should be used to the maximum extent practicable to select the partner. For example, where NASA has a limited resource or capability, exclusive or partially-exclusive agreements are warranted, subject to appropriate competition. Where an SAA provides a partner the opportunity for a direct commercial gain, *e.g.*, publishing and selling an anniversary or commemorative NASA publication (i.e., a commercial gain other than a commercial benefit obtained from commercializing a technology developed under the SAA), appropriate competition should also be used to select the partner. The extent of the competition, and the means of announcing the competition and selecting the partner(s), will depend on the specific opportunity. Announcement of such opportunities is made generally on the NASA Acquisition Internet Service (NAIS <http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi>). Competition may be waived by written justification by the responsible NASA official. However, the office of the Office of the General Counsel or Chief Counsel, as appropriate, shall be consulted, as often

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[27] The Unitary Wind Tunnel Act, 50 U.S.C. §§ 511 et seq., provides that NASA Unitary Wind Tunnels:

> [s]hall be available primarily to industry for testing experimental models in connection with the development of aircraft and missiles. Such tests shall be scheduled and conducted in accordance with industry's requirements and allocation of laboratory time shall be made in accordance with the public interest, with proper emphasis upon the requirements of each military services and due consideration of civilian needs. 50 U.S.C. § 513(c).

NASA's Unitary Wind Tunnels include (a) the Unitary Wind Tunnel Complex at NASA Ames Research Center and (b) the Unitary Wind Tunnel facility at NASA Langley Research Center.

public announcement and comment may be appropriate for such proposed exclusive or partially-exclusive arrangements.

If a unique or proprietary concept for exclusive use of a NASA resource is submitted by a private entity, it may still be appropriate to announce generally the availability of the NASA resource for commercial use or gain. However, NASA must exercise reasonable care not to reveal the unique or proprietary concept in such an announcement. Such situations will require close coordination with the Office of the General Counsel or Chief Counsel, as appropriate.

When exclusivity is appropriate, the resulting SAA should specify in the "Responsibilities" clause that the instrument is provided on an exclusive basis as part of NASA's obligations, and the nonexclusivity sample clause should be omitted. Where exclusivity is sought, then early in the formation process the relevant program or project office, along with the agreement drafter, should provide specific details of the activity to the NASA legal counsel so that appropriate terms can be included.

2.2.8. Nonexclusivity (Sample Clause)

2.2.9. LIABILITY AND RISK OF LOSS

SAAs must address responsibility for potential damages to persons and property arising from activities under the agreement. Determinations of the amount of risk NASA or the partner should assume will vary according to the type of agreement and the nature of the activity. Establishing appropriate risk allocation arrangements requires informed program, technical, and legal judgments. Early in the negotiations process, the relevant program or project office, along with the agreement drafter, should provide specific details of the activity to the NASA legal counsel so that appropriate clauses are included.

NASA risk allocation clauses primarily address two categories of foreseeable risk:

A. "First Party" liability: personal or property damage sustained by the parties to the agreement, and their related entities, including environmental and other economic losses; and

B. "Third Party" liability: personal or property damage sustained by individuals or entities that are not signatories to the SAA and entities having no contractual relationship with the parties relating to activities under the SAA.

Generally, unless liability is waived by the other party, each party is responsible for damages arising from its own actions. The general policy for liability/risk of loss in NASA SAAs is:

(1) each party to the SAA assumes the risk of damage to its own property and personnel (and that of its related entities) caused by its own actions (*e.g.*, NASA

agrees to be responsible for any damage to NASA property/personnel by NASA employees);

(2) each party to the SAA assumes the risk of third party damage caused by its own actions;

(3) for nonreimbursable SAAs, each party waives claims against the other (and the other's related entities) for first party damage (a *cross-waiver of claims*), unless caused by willful (intentional) misconduct;

(4) for reimbursable or partially reimbursable SAAs, the partner waives claims against NASA (and NASA's related entities) for first party damage (a *unilateral waiver of claims*), unless caused by willful (intentional) misconduct; and

(5) for reimbursable or partially reimbursable SAAs, the partner assumes the risk of damage to NASA caused by the partner's own actions.

If activities under an SAA are determined to be "high risk," that is, they carry a reasonable likelihood of significant damage to persons or high value assets, insurance covering the activities should customarily be required. *See* 2.2.9.3, Insurance Coverage.

2.2.9.1. SAAs FOR SHARED BENEFITS -- CROSS-WAIVER AND FLOW DOWN

If the SAA calls for sharing of substantive benefits (such as shared data and invention rights) arising from the agreement – usually nonreimbursable SAAs – risks will also be shared. In such cases, there should be a *cross-waiver of claims* between NASA and the partner for damages each causes to the other ("first parties").[28] To give full effect to a cross-waiver, "flow down" provisions should be included. These provisions require that each party's legally "related entities" (contractors, subcontractors, users, customers, investigators, and their contractors and subcontractors) waive claims against similar entities that may be legally related to any other party participating in an SAA activity.

Cross-waivers are required in SAAs for activities of mutual interest and benefit to NASA and the partner. In a cross-waiver, each party promises not to bring claims against the other party or the other's related entities for any harm to its property or employees. This means that each party reciprocally agrees to assume the risk of its own participation in the activity and is thus freed from concern that other parties involved in the activity may bring claims against it.

The fundamental purpose of requiring cross-waivers is to establish boundaries on liability to encourage space and aeronautical projects and other joint endeavors. Cross-waivers promote such endeavors in two ways. First, the potential for litigation is lowered because each party agrees up front to assume responsibility for specified damages it may sustain.

[28] Claims made by a natural person or by his or her estate, survivors, or subrogees (except when a subrogee is a party to the SAA or is otherwise bound by the terms of the cross-waiver) are excluded from the scope of the cross-waiver.

Second, insurance costs are reduced by sharply restricting the types of legal claims that may be brought by participating entities against each other.

Cross-waivers are uniquely suited for NASA aerospace activities. The basis of liability that would apply to such activities in the absence of any risk-sharing arrangement is one based on fault, with the responsible party being required to pay for any loss or damage it has caused. To encourage the broadest participation in aerospace activities, NASA seeks to avoid a fault-based regime in favor of one in which each party relinquishes any claims it may have for certain property losses or costs that result from injury to its employees, unless caused by the willful (intentional) misconduct of the other party.

For a cross-waiver to apply, both the entity causing damage and the entity sustaining damage must be involved in activities under the SAA.

Also, for damage NASA or the partner causes to others ("third parties") including product liability,[29] the responsible party will be liable. The partner may wish to obtain insurance for first party and third party damages, but NASA – as with all Federal agencies – may not purchase insurance, unless authorized by law, and "self insures" for such risks.

2.2.9.1.1. Liability and Risk of Loss (Cross-Waiver with Flow Down Provision Sample Clause)

In SAAs covering missions involving a launch or related to the ISS program, cross-waivers apply only if both entities are involved in "protected space operations." Agreements covering such activities require specific cross-waiver provisions as provided in 14 C.F.R. 1266. These activities include a wide range of design, transport, flight, and payload activities.

2.2.9.1.2. Liability and Risk of Loss (Cross-Waiver of Liability for Agreements Involving Activities Related to the ISS Sample Clause)

2.2.9.1.3. Liability and Risk of Loss (Cross-Waiver of Liability for Launch Agreements for Science or Space Exploration Activities Unrelated to the ISS Sample Clause)

2.2.9.2. SAAs PRIMARILY BENEFITTING AN SAA PARTNER – UNILATERAL WAIVER AND INSURANCE

If the partner compensates NASA for work under an SAA and NASA does not obtain other substantive benefits, the partner bears more risk with respect to the work performed. In such cases, the partner waives claims (*unilateral waiver*) against NASA. In addition, for "high risk" activities (such as launch facility support), the partner

[29] Product liability: With respect to products or processes resulting from a party's participation in a SAA, each party that markets, distributes, or otherwise provides such product, or a product designed or produced by such a process, directly to the public will be responsible for the safety of the product or process.

normally is required to maintain a reasonable amount of insurance coverage for first party damage to NASA and its related entities, and for damage to third parties arising from the activity. This insurance should cover the activities of all parties to the SAA, regardless of fault.

Unilateral Waivers: Under a unilateral waiver, the partner waives claims against NASA for damage to its property or injury to its personnel, regardless of which party may be at fault.[30] Typically, these waivers are used when NASA is providing goods or services on a reimbursable basis, and there is no substantive benefit to NASA under the agreement (such as data and invention rights). To give full effect to a unilateral waiver, "flow down" provisions should be included. These provisions require the partner's legally "related entities" (contractors, subcontractors, users, customers, investigators, and their contractors and subcontractors) to waive claims against any of NASA's related entities participating in an SAA activity. Under a unilateral waiver, the partner remains liable for damage to NASA caused by the partner's own actions.

2.2.9.2.1. Liability and Risk of Loss (Unilateral Waiver Sample Clause)

Insurance for Damage to NASA Property: Private commercial insurance is used to mitigate risk in reimbursable and partially reimbursable SAAs when there is a reasonable risk of significant damage to NASA property. Insurance is required in an amount sufficient to cover repair or replacement costs of impacted NASA resources. Policies must be on acceptable terms and obtained at no cost to NASA. Insurance provisions in SAAs generally also require that the Office of the General Counsel or Chief Counsel, as appropriate, review and approve policies prior to commencement of any covered activity.

2.2.9.2.2. Insurance for Damage to NASA (Short Form Sample Clause)

2.2.9.2.3. Insurance for Damage to NASA (Standard Form Sample Clause)

Insurance for Third Party Claims: Private commercial insurance is used to mitigate risk in reimbursable and partially reimbursable SAAs when there is a reasonable risk of significant injury to third parties or damage to third party property as a result of activities under the SAA. Insurance coverage for third party claims must be provided on acceptable terms and at no cost to NASA, and the policy must be presented to NASA for review prior to the commencement of any covered activity. NASA attorneys are familiar with insurance principles and can advise on acceptable terms and conditions.

2.2.9.2.4. Insurance Protecting Third Parties (Sample Clause)

2.2.9.3. INSURANCE COVERAGE

In determining insurance coverage to be required under an SAA, the following is considered:

[30] This waiver does not apply in circumstances involving criminal or willful (intentional) misconduct.

- *Rationale for property damage or third party liability insurance coverage:* The Federal Government "self insures" its own activities and is prohibited from obtaining insurance without express statutory authorization. Thus, when NASA performs work for the primary benefit of a private party, that party is usually required to obtain insurance coverage for "high risk" situations involving a reasonable likelihood of significant damage to high-value NASA facilities or to third parties, and to pay the cost for such insurance.

- *The likelihood of damage and the likely significance of such damage* are factors in deciding whether the activity is "high risk" and whether NASA should require the partner to obtain insurance. The purpose is to reduce the cost to NASA and the Federal Treasury in the event of loss or damage to taxpayer-funded facilities being put to use for largely private benefit, or damage to third parties.

- *Repair of damaged facilities:* Insurance proceeds for property damage to NASA facilities should not be payable to NASA because of the impact of the Miscellaneous Receipts Rule. The partner is the "loss payee" and is contractually responsible for making necessary repairs at NASA's direction. The SAA should require that the insurer fund repairs of property damage at the direction of NASA, or alternatively, that the partner place the proceeds in escrow and apply the proceeds to repair the damaged property as directed by NASA.

- *Waiver of insurance requirement:* Insurance requirements for an activity determined to be "high risk" may be waived if recommended by the project manager or other responsible official, reviewed by the Office of General Counsel (for Headquarters Agreements) or the Center Chief Counsel (for Center Agreements), and approved by the NASA signing official. Factors to consider in granting a waiver include: (1) the level of NASA interest in the activity, (2) the experience level of the partner, (3) safety considerations, (4) consideration of NASA's total risk or level of exposure in the event of a loss, (5) the maximum potential for damage to property relative to the program's ability to repair, and

- *Third Parties:* The risk of exposure of third parties to injury or damage to third party property.

2.2.10. INTELLECTUAL PROPERTY RIGHTS

This section addresses the allocation and protection of intellectual property rights in the following areas: (1) data rights; (2) rights in raw data generated under the SAA; (3) invention and patent rights; and (4) the U.S. Government's authorization and consent to the partner's use of third party patents and copyrights.

The following factors are considered in determining the terms of the intellectual property provisions in SAAs with domestic nongovernmental partners: (1) the purpose of the SAA; (2) whether the SAA is reimbursable or nonreimbursable; (3) whether NASA's or the partner's responsibilities involve inventive or creative activities; (4) whether the

partner is performing work for NASA; and (5) whether there is any likelihood that third party proprietary data or Sensitive But Unclassified (SBU) government data will be exchanged under the SAA. Consistency in the choice of intellectual property rights clauses and the terms therein, both across the Agency and with all nongovernmental entities, is the goal. However, since the Space Act permits flexibility in these matters, it may be desirable to modify the clauses to fit particular circumstances. Any questions regarding the applicability of or the deviations from intellectual property rights sample clauses should be referred to the Office of the General Counsel or Chief Counsel, as appropriate.

Generally, the provisions in the intellectual property rights sample clauses are the same for nonreimbursable and reimbursable SAAs. Where applicable, the sample clauses provide alternate paragraphs for use in nonreimbursable or reimbursable SAAs. Where NASA is reimbursed for less than the full cost of its activities under an SAA (partial reimbursement), the choice of which alternate paragraph to use should be based on whether other non-monetary benefits are obtained by NASA as a result of the SAA. As a general rule, additional benefits are obtained when the partner provides NASA with rights in data or inventions resulting from the SAA activity. In such cases, if NASA desires to use data generated under the SAA, the nonreimbursable alternate paragraphs should be used. If NASA obtains a benefit other than the use of data produced under the SAA, the reimbursable alternate paragraphs may be used. Notwithstanding the above, where less than full reimbursement is accepted, SAAs may include a combination of the clauses, *i.e.*, reimbursable clauses for the reimbursable portion of the SAA and nonreimbursable clauses for the nonreimbursable portion of the SAA.[31] Where no alternate paragraph is provided, the paragraph is used in both nonreimbursable and reimbursable SAAs.

Note: The Freedom of Information Act (5 U.S.C. § 552) provides for broad release of Federal agency records to a requestor, unless a specific FOIA exemption applies. The intellectual property clauses provide the basis for protection from release by the parties under specific FOIA exemptions (*e.g.*, FOIA exemptions for proprietary information, information disclosing inventions, and information developed by NASA under the SAA and protected under section 303(b) of the Space Act),.

2.2.10.1. DATA RIGHTS

Data rights sample clauses, 2.2.10.1.1 through 2.2.10.1.4 adequately cover most circumstances arising under reimbursable and nonreimbursable SAAs with domestic nongovernmental entities. Usually the basic protective and rights allocation scheme of the applicable clauses should be adopted without change; however, should there be a need to modify the clauses, the Office of the General Counsel or Chief Counsel, as

[31] While this practice is permissible, it is almost never used because activities are rarely divided between reimbursable activities and nonreimbursable activities. More likely than not, such reimbursable agreements will involve reimbursement of some percentage of overall costs.

appropriate, should be consulted. The clauses are summarized below, followed by detailed guidance on the use of each clause.

Data Rights sample clauses 2.2.10.1.1 (No Expected Proprietary Data Exchange) and 2.2.10.1.2 (Proprietary Data Exchange Addendum):

- These clauses are structured to facilitate the exchange of data necessary for the performance of the SAA, while providing for the protection of any proprietary data that is exchanged or developed.
- Further, in accordance with section 303(b) of the Space Act (42 U.S.C § 2454(b)), the clauses provide that data produced by NASA under an SAA that would be a trade secret or commercial or financial information that would be privileged or confidential had the data been obtained from the nongovernmental partner, and thus may have some commercial (or proprietary) value to the partner, may be protected from disclosure for up to 5 years.
- The clauses do not alter the ability of the partner to assert copyright in its works of authorship created under the SAA, but the partner is required to grant NASA a license in the copyrighted material to reproduce, distribute, and prepare derivative works for any purpose.

Data Rights sample clause 2.2.10.1.3 (For the Benefit of a Foreign Entity):

- Where NASA is performing reimbursable work for a domestic partner that is for the benefit of a foreign entity[32], guidance in NPD 1370.1 must be followed. Among other requirements, NPD 1370.1 provides that reimbursable work for the benefit of a foreign entity must provide a benefit to NASA or to the public. In reimbursable SAAs for: (1) safety-related analysis and testing in NASA facilities, or (2) fundamental research related to NASA's mission,[33] benefits to NASA or to the public are normally provided through shared data rights or broad dissemination of the results.[34]
- For any reimbursable work mentioned above, Data Rights sample clause 2.2.10.1.3 must be used unless other data rights provisions are approved by OER, on a case-by-case basis.
- Other domestic SAAs that may be for the benefit of a foreign entity but do not involve fundamental research or safety-related analysis and testing in NASA facilities may incorporate the traditional data rights clauses utilized in other reimbursable SAAs, clauses 2.2.10.1.1 and 2.2.10.1.2., in accordance with the guidance provided for those clauses.

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[32] "For the benefit of a foreign entity" means that a foreign entity could have access to and use of any deliverable items (including any data) and resulting from a reimbursable agreement by virtue of a contractual or other relationship (including common corporate ownership) with a party having such an agreement with NASA. (NPD 1370.1 paragraph (1)(d)(3)).

[33] "Fundamental research" means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community. Fundamental research is distinct from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons (NPD 1370.1 paragraph (1)(d)(4)).

[34] NPD1370.1.

Data Rights sample clause 2.2.10.1.4 (Free Exchange of Data):

- To be used in SAAs where the parties plan to exchange all data and information without any use and disclosure restrictions, except as required by law.

While consistency is the goal, any of the data rights clauses may be tailored or customized to fit the circumstances. For example, selected features of the more specific, protective data rights allocation scheme of the Addendum clause (2.2.10.1.2) may be added to the Basic clause (2.2.10.1.1) as needed and applicable. Additionally, NASA project personnel involved in the SAA should be consulted to ensure that the scope of NASA's right to use the partner's proprietary data is sufficiently broad to carry out programmatic goals. Other matters, such as special treatment of computer software, may be provided as an addition to the Basic clause when required based on the nature of the activities to be carried out. NASA Policy NPR 2210.1A should be followed when addressing protection of computer software in an SAA.

Data Rights sample clause 2.2.10.1.1 the "No Expected Proprietary Data Exchange clause (Basic Clause) is to be used in SAAs where: (a) no third party proprietary data or U.S. Government Sensitive But Unclassified (SBU) data[35] will be provided to the partner, and (b) no partner background data (proprietary data developed at private expense that existed prior to or was produced outside of the SAA) will be provided to NASA. Further, while proprietary data is not intended to be developed and exchanged under SAAs using the Basic clause, protection of such data is provided in the event such development and exchange should occur. Where applicable, the Basic clause provides alternate paragraphs for use in nonreimbursable or reimbursable SAAs. Where no such alternate paragraph is provided, the paragraph should be used in both nonreimbursable and reimbursable SAAs.

To the extent data marked as proprietary is furnished to NASA, the clause sets out the permitted use of such proprietary data. The treatment of proprietary data produced by the partner under the SAA varies depending on whether NASA is reimbursed for its activities under the SAA. For nonreimbursable SAAs, the consideration received from the partner includes the right of the U.S. Government to use or disclose such data for U.S. Government purposes. For fully reimbursable SAAs, since no additional consideration beyond full reimbursement is needed, NASA normally agrees that, upon completion of all activities under the SAA, NASA will retain no rights to use or disclose such data, but will dispose of the data as requested by the Partner. Where NASA accepts reimbursement for less than the full cost of its activities under an SAA (partial reimbursement), additional benefits received may include the right to use and disclose such data for U.S. Government purposes. Accordingly, the nonreimbursable alternate paragraphs may be used.

Data first produced by NASA under the SAA that would qualify as proprietary data if it had been obtained from the partner,[36] can be restricted upon request by the partner for a

[35] *See* NPR 1600.1, section 5.24 for definition and protection required for SBU data
[36] *See* section 303(b) of the National Aeronautics and Space Act of 1958, 42 U.S.C. § 2454(b).

period of up to 5 years (where the partner has not made such a request, NASA has discretion to restrict such data). Typically, the restriction period is 1 or 2 years. NASA project personnel involved in the SAA should be consulted to ensure that the restriction period is no longer than necessary. The treatment of such data during and after the restriction period varies depending on whether NASA is reimbursed for its activities. For nonreimbursable SAAs, during the restricted period such data can only be disclosed and used by the U.S. Government for U.S. Government purposes. After the restricted period such data can be used for any purpose. For reimbursable SAAs, such data will only be used for carrying our NASA's responsibilities under the SAA and, upon completion of SAA activities, such data will be disposed of as requested by the partner. Where NASA accepts reimbursement for less that the full cost of its activities under an SAA, but additional benefits are received, the nonreimbursable alternate paragraphs may be used. Data disclosing an invention owned by NASA for which patent protection is being considered is not generally restricted under these provisions.

Additionally, recognizing that section 203 of the Space Act (42 U.S.C. § 2473(a)(3)) requires NASA to provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof and that the dissemination of the results of NASA activities is one of the considerations for entering into most SAAs, the Basic clause addresses the rights of the parties related to their respective ability to publish the results obtained from the SAA. For nonreimbursable SAAs, the parties agree to coordinate any proposed publication of results with each other in a manner that allows each party a reasonable amount of time to review and comment on proposed publication. For reimbursable SAAs, NASA agrees that it will not publish any results without first receiving permission from the partner.[37]

The Basic clause also recognizes the right of the partner to assert copyright in works produced both outside of and under the SAA. However, with respect to works produced outside of the SAA, the receiving party and others acting on its behalf, may reproduce, distribute, and prepare derivative works only for carrying out the receiving party's responsibilities under the SAA. With respect to works produced under the SAA, the receiving party and others acting on its behalf may reproduce, distribute, and prepare derivative works for any purpose. Finally, the Basic clause addresses data disclosing an invention and data subject to export control.

2.2.10.1.1. Intellectual Property Rights - Data Rights (No Expected Proprietary Data Exchange Sample Clause)

Data Rights sample clause 2.2.10.1.2 the Proprietary Data Exchange Addendum (Addendum) is added to the Basic clause in SAAs where there is any likelihood that: (1) third party proprietary data or U.S. Government SBU data will be provided to the partner, or (2) partner background data will be provided to NASA. For example, the

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[37] Publication rights discussed here are different and should be distinguished from both rights in raw data (unanalyzed data generally of a scientific nature) generated under an agreement and release of general information to the public, which are discussed below.

Addendum is used in cooperative or collaborative SAAs in which research, experimental, developmental, engineering, demonstration, or design activities are to be carried out and it is likely that proprietary data will be developed or exchanged. The Addendum adds additional provisions to the Basic clause since more procedural specificity is necessary to address matters that often arise when it is anticipated that proprietary data is to be developed or exchanged. The provisions added by the Addendum are the same for both nonreimbursable and reimbursable SAAs.

The Addendum addresses NASA's right to use the partner's background data and provides for listing specific background data that the parties know will be exchanged, or anticipate may need to be exchanged, under the SAA. The Addendum also includes provisions on handling of data that specify the responsibilities of the partner related to the protection of: (1) proprietary data (including computer software) of third parties; and (2) U.S. Government SBU data (including computer software). To the extent such data can be identified at the beginning of the SAA, this provision requires such data to be specifically identified.

A final provision of the Addendum allows the partner to orally or visually disclose information it believes to be proprietary data, provided: (1) before such oral or visual disclosure is made, the partner advises NASA that such information is considered to be proprietary data, and (2) within 10 calendar days after such oral or visual disclosure is made, the partner reduces the information to a tangible, recorded form that is appropriately marked and provides the marked data to NASA. Sometimes, the partner wants more than 10 calendar days to meet its responsibilities in this paragraph. However, extending the time period makes NASA personnel vulnerable to the inadvertent disclosure of trade secrets or commercial or financial information, which is not advisable. If more than 10 calendar days is requested, the Office of the General Counsel or Chief Counsel, as appropriate, should be consulted. Lastly, an optional provision is provided for use in the event that access to, acquisition of, or delivery of classified material is required under the SAA.

2.2.10.1.2. Intellectual Property Rights - Data Rights (Proprietary Data Exchange Addendum)

Data Rights sample clause 2.2.10.1.3, the For the Benefit of a Foreign Entity Data Rights clause is to be used in reimbursable SAAs with domestic partners where the reimbursable work is for fundamental research or for safety related analysis and testing in NASA facilities and the work is ultimately for the benefit of a foreign entity. In SAAs meeting these criteria, the use of any alternate data rights clauses must be reviewed and approved by OER on a case-by-case basis.[38]

2.2.10.1.3. Intellectual Property Rights – Data Rights (Reimbursable SAA For the Benefit of a Foreign Entity Sample Clause)

[38] *See supra* section 1.5.

Where a reimbursable SAA for the benefit of a foreign entity does not meet the criteria described above, Data Rights clauses 2.2.10.1.1 and 2.2.10.1.2 are used in accordance with applicable guidance for those clauses as provided above.

Data Rights sample clause 2.2.10.1.4, the Free Exchange of Data clause is to be used in SAAs where the parties plan to exchange all data and information without any use and disclosure restrictions except as required by law. Examples of such circumstances include SAAs involving non-technical activities such as strategic alliances,[39] SAAs for educational or public outreach, or community or public affairs events.

2.2.10.1.4. Intellectual Property Rights – Data Rights (Free Exchange of Data Sample Clause)

2.2.10.2. RIGHTS IN RAW DATA GENERATED UNDER THE AGREEMENT

The Data Rights clauses above, address the rights of the parties to publish the overall results obtained under an SAA. In SAAs that include fundamental research or analysis of raw data (i.e., unanalyzed data usually of a scientific nature) by one or more Principal Investigators (PIs), consideration should be given to rights in raw data generated under the SAA. Such SAAs are generally related to research resulting from earth or space science missions, or analysis of earth or space science satellite raw data.

For space science activities, the SAA may reserve for the PIs a limited period of exclusive use of the raw data. The parties usually agree that the raw data derived from experiments will be reserved to the PIs named in the SAA for scientific analysis purposes and first publication rights for a set period of time. The reservation period should be as brief as practicable, and should not exceed one year. The period begins with receipt of the raw data and any associated (*e.g.*, spacecraft) data in a form suitable for analysis. In appropriate instances, PIs may be requested to share the data with other investigators, including interdisciplinary scientific and guest investigators, to enhance the scientific return from the mission (or program). Any such data-sharing procedures should be established in the SAA taking into consideration the first publication rights of the PIs. Following the period of exclusive use, the parties customarily agree to deposit the data in designated data repositories or data libraries, as appropriate, in order to make the data available to the broader scientific community.

In contrast, it is the practice in the Earth Science community to make its data widely available as soon as practicable after its acquisition and on-orbit calibration and validation. Their SAAs generally do not include any period of exclusive access for any user group, including PIs. The data is generally deposited in data repositories or data libraries available to the public.

2.2.10.2. Intellectual Property Rights - Rights in Raw Data (Sample Clause)

[39] NPD 1350.3.

Use of this clause requires the PI(s) and the exclusive use period of data for the PI or an identified group of researchers to be specifically identified in the SAA. Identify the exclusive use period even is there will be no provision for an exclusive use period, i.e., the period is zero. Where there is no identified PI or period of exclusive use, this clause should not be included in the SAA.

2.2.10.3. INVENTION AND PATENT RIGHTS

An SAA is an "other transaction" authorized by section 203(c) of the Space Act (42 U.S.C. § 2473(c)) and is not a procurement contract.[40] The fact that an SAA is not a procurement contract is important in the intellectual property area because a different allocation of rights results under a contract for the procurement of property or services[41] than under an SAA.[42]

Under an SAA, if a nongovernmental partner *performs work of an inventive type for NASA*, then section 305(a) applies. Under such a relationship, the partner may obtain title

[40] A procurement contract is defined by the Federal Acquisition Regulations (48 C.F.R. § 2.101) and the Federal Grants and Cooperative Agreements Act of 1977 (Chiles Act) (31 U.S.C. § 6303). The principal purpose of a procurement contract is to obtain property or services, such as the performance of work of an inventive type, for the direct benefit or use of the Government.

[41] Section 305(j) defines a "contract" under the Space Act broadly to include any contract, agreement, understanding or other arrangement, including subcontracts thereunder. Under section 305(a) of the Space Act (42 U.S.C. § 2457(a)), NASA is a title taking agency. Title to inventions made (conceived or first actually reduced to practice) under these Space Act "contracts" become the exclusive property of the United States Government. Under such "contracts," NASA may waive title to the invention to the "contractor" pursuant to 42 U.S.C. § 2457(f), but must retain a government purpose license in the waived invention. However, since enactment of the Bayh-Dole Act of 1980 (35 U.S.C. § 200 *et seq.*), any small business, nonprofit organization, or university can elect to retain title to inventions made under Bayh-Dole funding agreements (defined as contracts, grants and cooperative agreements for the performance of experimental, development, or research work and subcontracts thereunder). Bayh-Dole contracts are traditional procurement contracts and the Bayh-Dole Act takes precedence over section 305 of the Space Act (*see* 35 U.S.C. § 210 (a)(7)) for such procurement contracts. As a result, under procurement contracts, large businesses can only receive title if NASA agrees to waive title under the Space Act, while small businesses, nonprofit organizations, and universities may elect to receive title under the Bayh-Dole Act.

[42] SAAs, which are entered into under NASA's "other transaction" authority, are not Bayh-Dole funding agreements, and the Bayh-Dole Act does not apply. Furthermore, over the years, NASA has made administrative determinations that particular agreements/arrangements are not "contracts" for the purpose of section 305(a) of the Space Act. That is, NASA has made an agency administrative interpretation limiting the scope of "contract" as defined in section 305(j). Such agreements/arrangements included, for example: launch service agreements; agreements for use of NASA facilities (such as wind tunnels) where NASA provides services for another party, usually on a reimbursable basis; agreements for use of satellite data; technical exchange agreements; and agreements involving joint contributions of hardware to a common program. All these agreements/arrangements have a common theme: they do not involve the performance of work of an inventive type for NASA. Thus, NASA's long standing administrative interpretation of section 305(a) has been that the agreements/arrangements to which section 305(a) applies are those for the *performance of work of an inventive type* (i.e., design, engineering, development, research or experimental work) *for NASA*. This interpretation, in turn, has enabled a great deal of flexibility in dealing with invention and patent rights as they relate to relationships where work of an inventive type is not being done for NASA so as to encourage commercial participation.

to inventions it makes under the SAA through an advance or individual waiver,[43] and NASA benefits through retention of a government purpose license in the invention, as well as from the available commercial source of a needed technology. On the other hand, if a partner *does not perform work of an inventive type for NASA*, then section 305(a) does not apply, and NASA can tailor the allocation of invention and patent rights according to the activities of the SAA and the contributions of the parties. Because most SAAs do not involve work of an inventive nature being performed by the partner for NASA, NASA obtains no rights in inventions made solely by the partner under most SAAs. A case-by-case analysis is required to determine whether work to be performed by the partner under the SAA *is being performed for NASA*. For factors to consider when making this determination, refer to the description of the Section 305(a) invention and patent rights sample clause (2.2.10.3.3) below.

The invention and patent rights sample clauses reflect NASA's basic approach that has evolved over the years for commonly encountered circumstances. Sample clauses 2.2.10.3.1 and 2.2.10.3.2 are intended for use where the partner *is not performing work under the SAA for NASA*. Sample clause 2.2.10.3.1 is used when there is a low probability of an invention resulting from the proposed activities. Sample clause 2.2.10.3.2 is used where there is greater than a low probability that an invention will result from the proposed activities. Sample clause 2.2.10.3.3 is intended for use where the partner *is performing work under the SAA for NASA*. In the case where the partner is performing work for NASA, the probability of an invention resulting from the proposed work is not a consideration for clause selection.

Note: Any invention made under an SAA by a NASA employee or employee of a NASA related entity (where NASA acquires title from its related entity) on which the partner requests a license must be licensed in accordance with 37 C.F.R. Part 404, *Licensing of Government Owned Inventions*, and NASA must retain a Government-purpose license.

The Short Form invention and patent rights clause (2.2.10.3.1) is to be used in SAAs where the probability that an invention may result from the activities to be carried out under the SAA by either NASA or the partner is low (*e.g.*, use of facilities to provide test and evaluation of a partner's hardware, or a technology exchange agreements), and the partner *is not performing work for NASA*. The Short Form assures that no background rights in intellectual property are to be acquired. In addition, in the unlikely event that an invention may be made under the SAA, the Short Form adopts the policy that each party keeps rights to its own intellectual property (which would occur under the common law, lacking an express agreement to the contrary). The clause also provides that the parties will discuss and agree on rights and responsibilities for the filing of patent applications, and the licensing of such applications and resulting patents, should there be a joint invention. Under these circumstances, and under this policy, it should make no difference whether the activities under the SAA are reimbursable or nonreimbursable, and therefore, the clause is used in both reimbursable or nonreimbursable SAAs when the

[43] NASA liberally grants such waivers for the purpose of commercializing the waived invention (*see* Executive Order 12591, section 1, paragraph (b)(4)).

proposed work will not be performed for NASA, and the probability is low that either party will carry out inventive (or creative) activities under the SAA.

2.2.10.3.1. Intellectual Property Rights - Invention and Patent Rights (Short Form Sample Clause)

In SAAs involving non-technical activities, there is no probability that inventions will result. Thus, no invention and patent rights clause is required in such SAAs. However, if an invention and patent rights clause is desired, the Short Form clause may be used. Examples of such non-technical SAAs include strategic alliances,[44] SAAs for educational or public outreach, or community or public affairs events.

The Long Form invention and patent rights clause (2.2.10.3.2) is to be used in all SAAs where the probability that an invention may result from the activities to be carried out under the SAA by either NASA or the partner is other than low (*i.e.*, there is a medium or high likelihood that work of an inventive type will result), and the partner *is not performing work for NASA*. For example, if proposed activities under the SAA involve research and development (R&D), the probability that an invention may result from the R&D activities is other than low. Thus, in situations where the Long Form is used, while the partner may perform work of the type that could result in inventions being made, the partner is not performing such work of an inventive type *for* NASA.

Where applicable, the Long Form clause provides alternate paragraphs for use in nonreimbursable or reimbursable SAAs. Where no such alternate paragraph is provided, the paragraph should be used in both nonreimbursable and reimbursable SAAs. As with the data rights clauses, where NASA accepts reimbursement for less than the full cost of its activities under an SAA, but additional non-monetary benefits are received, the nonreimbursable alternate paragraphs may be used.

As under the Short Form, the principle that each party keeps rights to its own intellectual property applies. Thus, NASA generally acquires no rights to any invention made solely by the partner, but may negotiate a license to use a partner invention for research, experimental, and evaluation purposes. As an incentive to commercialize NASA developed technology, NASA will use reasonable efforts to grant the partner a license[45] (on terms and conditions to be negotiated) to any invention made under the SAA by NASA employees or a NASA related entity (where NASA acquires title from its related entity). Normally, NASA grants licenses only to inventions on which it has filed, or intends to file, a patent application. As to joint inventions (inventions made jointly by the partner and NASA or its related entities where NASA acquires title from its related entity), NASA may agree to refrain from exercising its undivided interest in joint inventions in a manner inconsistent with the partner's commercial interests or may use reasonable efforts to grant the partner an exclusive or partially exclusive license in its undivided interest.

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[44] NPD 1350.3.
[45] In accordance with the requirements of 37 C.F.R. Part 404.

Any license to the partner will be subject to the retention of a government purpose license and a nonexclusive license to the NASA related entity (where title is acquired from a related entity). For reimbursable SAAs where NASA is reimbursed for the full cost of its participation under the SAA, NASA will use reasonable efforts to limit use under the Government purpose license to use by or on behalf of NASA for research, experimental, or evaluation purposes. Consistent with Government-wide regulations, all licenses to the partner will be revocable. For example, the license may be revoked if the invention is not commercialized consistent with NASA (and Government-wide) policy on licensing inventions. Normally, licenses are royalty-bearing and thus provides an opportunity for royalty-sharing with the Government employee-inventor consistent with NASA and Government-wide policy under the National Technology Transfer and Advancement Act (P.L. 104-113) (15 U.S.C. § 3710 *et seq.*, as amended). Additionally, under Government-wide policy, NASA may share royalties with a partner-inventor who assigns patent rights directly to the Government.

2.2.10.3.2. Intellectual Property Rights - Invention and Patent Rights (Long Form Sample Clause)

The Section 305(a) invention and patent rights sample clause (2.2.10.3.3) is to be used in SAAs where a partner *is performing work for NASA*. The probability that the proposed work may result in an invention is not a consideration for use of the Section 305(a) clause. For example, even if there is a low probability that work of an inventive type will result, if the work is being performed for NASA and an invention does result (however unlikely), the Section 305(a) clause is the proper clause. Under section 305(a) of the Space Act, title to inventions developed by the partner under these SAAs vest in the U.S. Government. However, under section 305(f), the partner may receive title through the NASA waiver process. NASA will liberally grant both advance and individual waivers to SAA partners for the purpose of commercializing the waived invention.

A case-by-case analysis is required to determine when work to be performed by the partner under the SAA *is being performed for NASA*. To make this determination, the following factors should be considered:

1. Whether the partner will be reimbursing NASA for its contributions – Generally, under reimbursable SAAs, work is not being done "for NASA," and section 305(a) of the Space Act does not apply to rights in inventions.

2. Whether work under the SAA involves research and development (R&D) – Generally, if R&D activities to be performed by the partner are intended for NASA's direct benefit, section 305(a) applies. If research and development activities of the partner relate to a cooperative effort "with NASA" rather than a directed effort "for NASA," section 305(a) does not apply. In determining whether the SAA is a true cooperative arrangement, the partner's planned use of any inventions developed under the SAA, while not determinative, should be considered. For example, the partner is more likely to perform inventive work for its own benefit if marketing the technology in the commercial marketplace is the

primary economic rationale for entering the SAA (*e.g.*, the partner has an existing commercial market for the technology at issue). Alternatively, the partner is more likely to perform inventive work for NASA if selling the technology to NASA is the primary economic rationale for entering the SAA (*e.g.*, the partner is a historical NASA contractor and plans to sell the inventive work back to NASA).

3. Whether work to be performed by the partner under the SAA is required by NASA in order to meet a specific identified mission or programmatic requirement. Generally, under nonreimbursable SAAs, if work to be performed by the partner is not needed to satisfy a specific identified mission/programmatic requirement, then the partner's work is not being performed for NASA and section 305(a) does not apply, even if achievements or advancements that may result from a partner's efforts will benefit NASA to the extent the agency decides to incorporate them into a NASA program at a future time. If, on the other hand, the primary purpose of the SAA is to produce a specific technology (or improvement to an existing technology) needed to accomplish an identified mission/programmatic requirement, then the work is being performed for NASA, and section 305(a) applies.

When the foregoing analysis indicates that work is being performed for NASA, the Section 305(a) sample clause 2.2.10.3.3 should be used. When it is determined that work is not being performed for NASA, sample clause 2.2.10.3.3 does not apply, and the appropriate invention and patent rights clause is selected from sample clauses 2.2.10.3.1 or 2.2.10.3.2 as described above. The Office of the General Counsel or Chief Counsel, as appropriate, should be included early in the determination of whether work is being performed for NASA.

Additionally, NASA will use reasonable efforts to grant the partner an exclusive or partially exclusive license, consistent with the requirements of 37 C.F.R Part 404, to any invention made under the SAA by NASA employees or a NASA related entity (where NASA acquires title from its related entity). The foregoing also applies to any undivided interest NASA acquires for any invention made jointly with the partner under an SAA.

2.2.10.3.3. Intellectual Property Rights - Invention and Patent Rights (Section 305(a) Sample Clause)

2.2.10.4. PATENT AND COPYRIGHT USE -- AUTHORIZATION, CONSENT, AND INDEMNIFICATION

One of the remedies available to a patent owner for patent infringement is an injunction preventing the alleged infringer from making, using, or selling the patented invention. However, under 14 U.S.C. § 1498(a), such an injunction is not available when the use or manufacture is by or for the United States and with the authorization and consent of the U.S. Government. Similarly, one of the remedies available to a copyright owner for copyright infringement is an injunction preventing the alleged infringer from reproducing the copyrighted work, preparing derivative works based upon the copyrighted work,

distributing copies of the copyrighted work to the public, or performing or displaying the copyrighted work publicly. However, under 14 U.S.C. § 1498(b), such an injunction is not available when such infringement is by or for the United States and with the authorization and consent of the U.S. Government. In both cases, the intellectual property rights owner's sole remedy is an action against the United States in the U.S. Court of Federal Claims for the recovery of his reasonable and entire compensation.[46]

Generally, if the Invention and Patent Rights-Section 305(a) sample clause is included in an SAA (*i.e.*, where the partner is performing work under the SAA for NASA), and the NASA patent or intellectual property counsel determines that activities of the partner, or its related entities, required to fulfill the purpose of the SAA are likely to be legally enjoined by a patent or copyright owner in the U.S., then the Authorization and Consent sample clause should be included in order to avoid an injunction. This also avoids any legal arguments regarding whether authorization and consent, if not expressed, should be implied because of the beneficial cooperation involved in the SAA. If the clause was not initially included in the SAA, it can be added by the parties by mutual agreement. The Authorization and Consent clause may be included in SAAs that do not include the Section 305(a) clause if the NASA patent or intellectual property counsel determines that its inclusion may be necessary to fulfill the purpose of the SAA.

Whenever the Authorization and Consent clause is included in an SAA, the NASA patent or intellectual property counsel should be consulted to determine whether the Indemnification Clause should be included to protect the U.S. Government financially if infringement liability is incurred.

2.2.10.4.1. Patent and Copyright Use - Authorization and Consent (Sample Clause)

2.2.10.4.2. Patent and Copyright Use - Indemnification (Sample Clause)

2.2.11. USE OF NASA NAME AND EMBLEMS AND RELEASE OF GENERAL INFORMATION TO THE PUBLIC

Sample clause 2.2.11, which addresses the partner's use of the NASA name and emblems, should be used in all SAAs. The Space Act prohibits the knowing use of the words 'National Aeronautics and Space Administration' or the letters 'NASA' in connection with a product or service "in a manner reasonably calculated to convey the impression that such product or service has the authorization, support, sponsorship, or endorsement . . . of [NASA] which does not, in fact, exist."[47] Consequently, NASA's policy is to allow the NASA name and initials to be used in non-NASA publications (*e.g.*, advertisements, promotional literature, etc.) only if: (1) the use is factual and does not, either expressly or by implication, endorse a commercial product, service or activity; and (2) the use does not mislead in any manner. For example, statements pertaining to facts

[46] Essentially, the U.S. Government has waived sovereign immunity with respect to monetary compensation for patent or copyright infringement, but not with respect to injunction.
[47] 42 U.S.C. § 2459b.

surrounding the use of a product or service can be permitted provided subjective statements regarding the selection, use, and performance of the product or service are not used. Any proposed public use by partners of the NASA name or initials must be submitted in advance to NASA Office of Public Affairs for review and approval.

Use of NASA emblems/devices (*i.e.*, NASA Seal, NASA Insignia, NASA logotype, NASA Program Identifiers, and the NASA Flag) is governed by 14 C.F.R. Part 1221 and requires prior review and approval by the NASA Office of Public Affairs. Thus, permission to use any of the NASA emblems/devices should not be granted in an SAA without the prior written approval of the NASA Office of Public Affairs.

The clause also addresses release by a partner of general information regarding its participation in the SAA, and review by NASA of partner press releases about activities under the SAA and advertising and promotional materials that may refer to NASA.

2.2.11. Use of NASA Name and NASA Emblems and Release of General Information to the Public (Sample Clause)

2.2.12. DISCLAIMERS

2.2.12.1. DISCLAIMER OF WARRANTY

The Disclaimer of Warranty clause should be used when NASA provides goods or services for use by nongovernmental entities. This sample clause provides that goods (*i.e.*, equipment, facilities, technical information, etc.) and services are provided "as is" and without any warranty or guarantee that such goods and services are reliable, free of any known defects, or in a certain condition.

2.2.12.1. Disclaimer of Warranty (Sample Clause)

2.2.12.2. DISCLAIMER OF ENDORSEMENT

NASA does not endorse or sponsor any commercial product, service, or activity. Therefore, all SAAs with nongovernmental partners should include a Disclaimer of Endorsement clause. The sample clause provides that NASA's participation in the SAA does not constitute NASA's endorsement of the results of any SAA activity, including designs, hardware, test analysis, etc.

2.2.12.2. Disclaimer of Endorsement (Sample Clause)

2.2.13. COMPLIANCE WITH LAWS AND REGULATIONS

This section places the parties on notice that they must comply with all laws and regulations and government policies that affect or relate to the performance of this SAA. The clause calls special attention to safety, security, export control, and environmental laws because any violations (non-compliance) may result in civil or criminal penalties.

The clause also calls attention to NASA security policy and guidelines including standards on badging and facility access.

2.2.13. Compliance with Laws and Regulations (Sample Clause)

2.2.14. TERM OF AGREEMENT

This section sets forth the duration of the SAA which must state a definite term. The effective date, the date the SAA enters into force, is the date of last signature. Because of uncertainties as to rate of progress, the ending date (*e.g.* expiration date) may be determined based on two possible outcomes – arrival at a date certain, or completion of both parties' obligations, whichever comes first. This second approach allows NASA to close out the SAA if all related activity is accomplished ahead of schedule, without having to terminate the SAA.

NASA limits its SAAs to 5-year terms in all but very few cases because any commitment of resources far into the future may be problematic since budgets and program objectives may change. For the same reason, use of an automatic renewal provision may be problematic. Where a commitment exceeding five years is essential to the fundamental objectives of the SAA, early consultation with the Office of the General Counsel or Chief Counsel, as appropriate, is essential.

In the event performance will not be completed by the agreed upon end date, the parties may mutually agree to extend the term of the SAA by executing a modification. Any modification must be executed consistent with the terms in the "Modifications" clause (2.2.20) prior to the SAA's expiration date. Use of a modification clause to extend the SAA is preferable to any long-term commitment by NASA. Any attempt to use a modification clause to extend or revive the term of an expired SAA is ineffective.

2.2.14.1 Term of Agreement (Sample Clause)

2.2.14.2 Term of Task (Annex Sample Clause)

2.2.15. RIGHT TO TERMINATE

This section delineates the conditions under which either party can terminate an SAA. Termination notice must be in writing. The notice of termination can be effected by letter, email, or facsimile. Consideration should be given to the length of time needed for notice to minimize programmatic impacts. For SAAs involving low risk activities, it often makes sense to provide that either party may terminate after 30 days notice. Longer termination notice periods may be required where termination has far-reaching programmatic or budgetary implications. Such SAAs may also provide for negotiation of a termination agreement during this period to provide for disposition of property used for activities under the SAA or to address other outstanding issues.

Note: Sample Clause 2.2.15.3 is only used in very rare circumstances, for example, when the Partner is funding infrastructure improvements to NASA property for a partially commercial business that requires upfront investments on the part of the Partner. If NASA required unilateral termination rights, which is generally provided in its SAAs, the Partner would be unable to build its business and raise capital. The question to be asked in deciding whether to use Sample Clause 2.2.15.3 is whether the benefit to NASA justifies a significant limitation of its termination rights as found in that clause.

2.2.15.1. Right to Terminate (Nonreimbursable Agreement Sample Clause)

2.2.15.2. Right to Terminate (Reimbursable Agreement Sample Clause)

2.2.15.3. Right to Terminate (Reimbursable Agreement Requiring High Certainty of Support Sample Clause)

2.2.15.4 Right to Terminate (Nonreimbursable Umbrella Agreement Sample Clause)

2.2.15.5 Right to Terminate (Reimbursable Umbrella Agreement Sample Clause)

2.2.16. CONTINUING OBLIGATIONS

The SAA should specify that "Liability and Risk of Loss" clauses and the "Intellectual Property Rights" clauses survive termination or expiration of the SAA. For reimbursable SAAs, the "Financial Obligations" clause also survives termination or expiration of the SAA.

2.2.16. Continuing Obligations (Sample Clause)

2.2.17. MANAGEMENT POINTS OF CONTACT

To establish clear management interfaces, project level, or in some cases, program level Points of Contact (POCs) should be specified as guided by the SAA activity and the management framework of both parties. For example, in larger projects, there may be program managers identified as having management oversight, and program scientists designated as key officials for all science goals. For NASA, the POCs should always be NASA employees. Principal Investigators should also be identified in SAAs if the Intellectual Property Rights – Rights in Raw Data sample clause (2.2.10.2) is used.

2.2.17.1 Management Points of Contact (Sample Clause)

2.2.17.2 Technical Points of Contact (Annex Sample Clause)

2.2.18. DISPUTE RESOLUTION

In general, all SAAs include a dispute resolution clause. The clause outlines the specific procedures to be followed. SAAs include language stating that all parties agree to consult promptly with each other on all issues involving interpretation, implementation, or performance of the SAA. Generally, issues are handled at the working level before being elevated to a higher level if the parties cannot achieve resolution. If the parties are unable to reach resolution at this level, the NASA official at that level, or one level higher (depending on the complexity and visibility of the SAA activity) should provide to the partner, in writing, a final Agency decision. This final Agency decision becomes part of the administrative record of the dispute.

Note: With rare exception, the NASA Administrator should not be involved in dispute resolution activities. Use of the Administrator as the designated official for making a final Agency decision requires consultation with the Offices of the Administrator and the General Counsel.

In very limited instances, NASA may agree to an approach that permits possible settlement of disputes through an agreed form of resolution, such as non-binding arbitration or mediation. However, both parties, at that time, must agree to submission of the specific matter in dispute. Agreement to any arbitration clause is highly unusual and requires specific approval by the General Counsel.

2.2.18. Dispute Resolution (Sample Clause)

2.2.19. MISHAP INVESTIGATION

For domestic activities where there is the possibility of a serious accident or mission failure occurring and the parties include non-U.S. Government personnel, it is advisable to include a mishap investigation clause in the SAA. NASA mishaps are conducted pursuant to NPR 8621.1A, "NASA Procedural Requirements for Mishap Reporting, Investigating and Recordkeeping," which may be applicable to the SAA.

2.2.19. Mishap Investigation (Sample Clause)

2.2.20. MODIFICATIONS

This section requires that any modification (amendment) to the SAA be executed in writing and signed by an authorized representative of each party, usually the signing officials or, in some cases, their designees. Furthermore, it requires that any modification that results in a commitment of additional NASA resources be executed in writing by the original signing officials. When modifying an Umbrella Agreement, consideration should be given to its effect on executed Annexes.

2.2.20. Modifications (Sample Clause)

2.2.21. ASSIGNMENT

As a general rule, assignment of an SAA is not advisable or practical. This clause precludes any assignment of the SAA or any rights under the SAA to other entities without the express written permission of the signing officials.

2.2.21. Assignment (Sample Clause)

2.2.22. APPLICABLE LAW

As NASA is an agency of the Federal Government, U.S. Federal law governs its domestic activities, and the SAA should so state. Failure to include this clause, or making reference to state law, even where Federal law is silent, carries legal risk. It could result in the partner seeking to establish jurisdiction for a suit against NASA (the Agency or a Federal officer) in a state court or otherwise applying state law to Federal activities. This would be in violation of Federal law that establishes that only the Department of Justice has the authority to consent to state jurisdiction over litigation involving Federal agencies (28 U.S.C. § 1441 *et seq.*).

2.2.22. Applicable Law (Sample Clause)

2.2.23. INDEPENDENT RELATIONSHIP

The other party to an SAA is referred to herein as the "partner". However, this shorthand designation is not intended to create a formal business organization or "partnership" as that term is normally used. Therefore, a clause indicating that the parties to the SAA remain independent entities and that the rights and obligations of the parties shall be only those expressly set forth in the SAA should be included in every SAA.

2.2.23 Independent Relationship (Sample Clause)

2.2.24. LOAN OF GOVERNMENT PROPERTY

On occasion, government property is lended to a partner as part of a larger SAA effort. Sample clause 2.2.24 is used when the terms of the loan are included in an SAA covering a collaboration for which the equipment loan is merely one element of the respective roles and responsibilities of NASA and the partner. Alternatively, a separate loan agreement may be used (*see* Sec. 1.8.7).

2.2.24 Loan of Government Property (Sample Clause)

2.2.25 SPECIAL CONSIDERATIONS

This section is reserved for additional Center specific requirements.

2.2.26. SIGNATORY AUTHORITY

This section provides a signature block, as well as the typed name, title, and date of signature for the responsible signatories for each party. Two original copies should be signed by both parties. During negotiations, care should be taken to identify and confirm that the signatories have authority to bind the parties; usually they are senior management officials (authority for NASA signing officials is provided in NPD 1050.1H). However, NASA does not require or recommend that the partner's signatory be required to demonstrate the requisite authority through provision of company documents, such as a formal delegation of authority.

2.2.26. Signatory Authority (Sample Clause)

APPENDIX 2. SAMPLE CLAUSES – NONREIMBURSABLE AND REIMBURSABLE AGREEMENTS WITH DOMESTIC NONGOVERNMENTAL ENTITIES

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2. AGREEMENT CONTENTS

2.2.1.1. Title (Nonreimbursable Agreement Sample Clause)

Nonreimbursable [subtitle, as appropriate] Space Act Agreement between [name of partner] and National Aeronautics and Space Administration, [Center name] for _____ [state brief purpose].

2.2.1.2. Title (Reimbursable Agreement Sample Clause)

Reimbursable [subtitle, as appropriate] Space Act Agreement between [name of partner] and National Aeronautics and Space Administration, [Center name] for _____ [state brief purpose].

2.2.1.3 Title (Annex Agreement Sample Clause)

Annex between the National Aeronautics and Space Administration, [Center Name], and [name of partner] under Space Act Agreement No. _____, Dated _____.

2.2.2. Authority and Parties (Sample Clause)

In accordance with The National Aeronautics and Space Act of 1958, as amended (42 U.S.C. § 2473 (c)), this Agreement is entered into by the NASA [Center name] located at _____ (hereinafter referred to as "NASA" or "NASA [Center initials]" and _____ Corporation located at _____ (hereinafter referred to as "Partner"). NASA and Partner may be individually referred to as a "Party" and collectively referred to as the "Parties."

2.2.3.1 Purpose (Sample Clause)

This Agreement shall be for the purpose of _____.

2.2.3.2 Purpose and Implementation (Umbrella Agreement Sample Clause)

This Umbrella Agreement shall be for the purpose of _____.

The Parties will execute one (1) Annex concurrently with this Umbrella Agreement. Subsequent Annexes are authorized under this Umbrella Agreement consistent with the purpose and terms of this Umbrella Agreement. Each Annex will detail the specific purpose of the proposed activity, responsibilities, schedule and milestones, and any personnel, property or facilities to be utilized under the task. This Umbrella Agreement

takes precedence over any Annexes. In the event of a conflict between the Umbrella Agreement and any Annex concerning the meaning of its provisions, and the rights, obligations and remedies of the Parties, the Umbrella Agreement is controlling.

2.2.4.1. Responsibilities (Sample Clause)

NASA[Center initials] will use reasonable efforts to:

1.
2.
3.

Partner will use reasonable efforts to:

1.
2.
3.

2.2.4.2. Responsibilities (Technical Exchange Agreement Sample Clause)

NASA will provide Partner on a reasonable efforts, non-interference basis publicly available technical data and other information that is requested, in writing, by Partner and is necessary to Partner's design, planning, or construction of its planned _____. Partner shall provide to NASA any technical and other data regarding its design, construction, and operations planning to the extent that the Parties agree this data is necessary for NASA to respond to Partner's requests for information.

2.2.4.3 Responsibilities (Umbrella Agreement Sample Clause)

NASA[Center initials] will use reasonable efforts to:

1. Provide support of projects undertaken in any Annex;
2. Provide internal coordination of approvals for Annexes;
3. Provide for a single point of contact for Annex development and operations.

Partner will use reasonable efforts to:

1. Provide support of projects undertaken in any Annex;
2. Provide internal coordination of approvals for Annexes;
3. Provide for a single point of contact for Annex development and operations.

2.2.4.4. Responsibilities (Annex Sample Clause)

NASA[Center initials] will use reasonable efforts to:

1.

2.
3.

Partner will use reasonable efforts to:

1.
2.
3.

2.2.5.1 Schedule and Milestones (Sample Clause)

The planned major milestones for the activities defined in the "Responsibilities" clause are as follows:

2.2.5.2 Schedules and Milestones (Umbrella Agreement Sample Clause)

The Parties will execute one (1) Annex concurrently with this Umbrella Agreement. Additional Annexes will be performed on the schedule and in accordance with the milestones set forth in such Annex.

2.2.5.3 Schedules and Milestones (Annex Sample Clause)

The planned major milestones for the activities defined in the "Responsibilities" clause are as follows:

2.2.6.1. Financial Obligations (Nonreimbursable Agreement Sample Clause)

There will be no transfer of funds or other financial obligations between the Parties under this Agreement and each Party will fund its own participation. All activities under or pursuant to this Agreement are subject to the availability of funds, and no provision of this Agreement shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, Title 31 U.S.C. § 1341.

2.2.6.2. Financial Obligations (Reimbursable Agreement Sample Clause)

1. Partner agrees to reimburse NASA an estimated cost of ($ total dollars) for NASA to carry out its responsibilities under this Agreement. In no event will NASA transfer any U.S. Government funds to Partner under this Agreement. Payment must be made by Partner in advance of initiation of NASA's efforts. [For incremental payments, insert payment schedule.] Advance payments shall be scheduled to ensure that funds are resident with NASA before Federal obligations are incurred in support of this Agreement.

2. Payment shall be payable to the National Aeronautics and Space Administration through [choose one form of payment: U.S. Treasury FEDWIRE Deposit System, Federal Reserve Wire Network Deposit System, pay.gov at https://www.nssc.nasa.gov/portal/site/

customerservice/menuitem.bb29c518138071c056969daf4dd72749, or check. A check should be payable to NASA [Insert Center Name] and sent to: NASA Shared Services Center; FMD – Accounts Receivable; Bldg 1111, C Road; Stennis Space Center, MS 39529.

3. NASA will not provide services or incur costs beyond the available funding amount. Although NASA has made a good faith effort to accurately estimate its costs, it is understood that NASA provides no assurance that the proposed effort under this Agreement will be accomplished for the above estimated amount. Should the effort cost more than the estimate, Partner will be advised by NASA as soon as possible. Partner shall pay all costs incurred and have the option of canceling the remaining effort, or providing additional funding in order to continue the proposed effort under the revised estimate. Should this Agreement be terminated, or the effort completed at a cost less than the agreed-to estimated cost, NASA shall account for any unspent funds within [Insert timeframe, cannot exceed one (1) year] after completion of all effort under this Agreement, and promptly thereafter, return any unspent funds to Partner.

4. Notwithstanding any other provision of this Agreement, all activities under or pursuant to this Agreement are subject to the availability of funds, and no provision of this Agreement shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, Title 31 U.S.C. § 1341.

2.2.6.3 Financial Obligations (Reimbursable Umbrella Agreement Sample Clause)

1. Partner agrees to reimburse NASA as set forth in each Annex for NASA to carry out its responsibilities under this Agreement. In no event will NASA transfer any U.S. Government funds to Partner under this Agreement. Partner shall make payment in advance of initiation of NASA's efforts. Advance payments shall be scheduled to ensure that funds are resident with NASA before Federal obligations are incurred in support of this Agreement.

2. Payment shall be payable to the National Aeronautics and Space Administration through [choose one form of payment: U.S. Treasury FEDWIRE Deposit System, Federal Reserve Wire Network Deposit System, pay.gov at https://www.nssc.nasa.gov/portal/site/customerservice/menuitem.bb29c518138071c056969daf4dd72749, or check. A check should be payable to NASA [Insert Center Name] and sent to: NASA Shared Services Center; FMD – Accounts Receivable; Bldg 1111, C Road; Stennis Space Center, MS 39529.

3. Notwithstanding any other provision of this Agreement, all activities under or pursuant to this Agreement are subject to the availability of funds, and no provision of this Agreement shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, Title 31 U.S.C. § 1341.

2.2.6.4 Financial Obligations (Reimbursable Annex Sample Clause)

1. Partner agrees to reimburse NASA an estimated cost of ($ total dollars) for NASA to carry out its responsibilities under this Annex.

2. NASA will not provide services or incur costs beyond the available funding amount. Although NASA has made a good faith effort to accurately estimate its costs, it is understood that NASA provides no assurance that the proposed effort under this Annex will be accomplished for the estimated amount. Should the effort cost more than the estimate, Partner will be advised by NASA as soon as possible. Partner shall pay all costs incurred and have the option of canceling the remaining effort, or providing additional funding in order to continue the proposed effort under the revised estimate. Should this Annex be terminated, or the effort completed at a cost less than the agreed-to estimated cost, NASA shall account for any unspent funds within one (1) year after completion of all effort under this Annex, and promptly thereafter, at Partner's option return any unspent funds to Partner or apply such unspent fund to other activities under this Agreement

2.2.7. Priority of Use (Sample Clause)

Any schedule or milestone in this Agreement is estimated based upon the Parties' current understanding of the projected availability of NASA personnel, facilities and equipment. In the event that NASA's projected availability changes, Partner shall be given reasonable notice of that change, so that the schedule and milestones may be adjusted accordingly. The Parties agree that NASA usage of the facilities, equipment, and personnel shall have priority over the usage planned in this Agreement. Should a conflict arise, NASA in its sole discretion shall determine whether to exercise that priority. Likewise, should a conflict arise as between two commercial users, NASA, in its sole discretion, shall determine the priority as between the two users. This Agreement does not obligate NASA to seek alternative government property or services under the jurisdiction of NASA at other locations.

2.2.8. Nonexclusivity (Sample Clause)

This Agreement is not exclusive; accordingly, NASA may enter into similar agreements for the same or similar purpose with other U.S. private or public entities.

2.2.9.1.1. Liability and Risk of Loss (Cross-Waiver Sample Clause)

1. Each Party hereby waives any claim against the other Party, employees of the other Party, the other Party's Related Entities (including but not limited to contractors and subcontractors at any tier, grantees, investigators, customers, users, and their contractors or subcontractor at any tier), or employees of the other Party's Related Entities for any injury to, or death of, the waiving Party's employees or the employees of its Related Entities, or for damage to, or loss of, the waiving Party's property or the property of its

Related Entities arising from or related to activities conducted under this Agreement, whether such injury, death, damage, or loss arises through negligence or otherwise, except in the case of willful misconduct.

2. Each Party further agrees to extend this cross-waiver to its Related Entities by requiring them, by contract or otherwise, to waive all claims against the other Party, Related Entities of the other Party, and employees of the other Party or of its Related Entities for injury, death, damage, or loss arising from or related to activities conducted under this Agreement. Additionally, each Party shall require that their Related Entities extend this cross-waiver to their Related Entities by requiring them, by contract or otherwise, to waive all claims against the other Party, Related Entities of the other Party, and employees of the other Party or of its Related Entities for injury, death, damage, or loss arising from or related to activities conducted under this Agreement.

2.2.9.1.2. Liability and Risk of Loss (Cross-Waiver of Liability for Agreements Involving Activities Related to the ISS Sample Clause) (Based on 14 CFR 1266.102).

1. The objective of this Article is to establish a cross-waiver of liability in the interest of encouraging participation in the exploration, exploitation, and use of outer space through the International Space Station (ISS). The Parties intend that the cross-waiver of liability be broadly construed to achieve this objective.

2. For the purposes of this Article:

a. The term "Damage" means:

(i) Bodily injury to, or other impairment of health of, or death of, any person;
(ii) Damage to, loss of, or loss of use of any property;

(iii) Loss of revenue or profits; or

(iv) Other direct, indirect, or consequential Damage.

b. The term "Launch Vehicle" means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries Payloads, persons, or both.

c. The term "Partner State" includes each Contracting Party for which the Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station (IGA) has entered into force, pursuant to Article 25 of the IGA or pursuant to any successor agreement. A Partner State includes its Cooperating Agency. It also includes any entity specified in the Memorandum of Understanding (MOU) between NASA and the Government of Japan to assist the Government of Japan's Cooperating Agency in the implementation of that MOU.

d. The term “Payload” means all property to be flown or used on or in a Launch Vehicle or the ISS.

e. The term “Protected Space Operations” means all Launch Vehicle or Transfer Vehicle activities, ISS activities, and Payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of this Agreement, the IGA, MOUs concluded pursuant to the IGA, and implementing arrangements. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of Launch Vehicles or Transfer Vehicles, the ISS, Payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment and related facilities or services.

“Protected Space Operations” also includes all activities related to evolution of the ISS, as provided for in Article 14 of the IGA.

“Protected Space Operations” excludes activities on Earth which are conducted on return from the ISS to develop further a Payload's product or process for use other than for ISS-related activities in implementation of the IGA.

f. The term “Related Entity” means:

(i) A contractor or subcontractor of a Party or a Partner State at any tier;

(ii) A user or customer of a Party or a Partner State at any tier; or

(iii) A contractor or subcontractor of a user or customer of a Party or a Partner State at any tier.

The terms “contractor” and “subcontractor” include suppliers of any kind.

The term “Related Entity” may also apply to a State, or an agency or institution of a State, having the same relationship to a Partner State as described in paragraphs (2)(f)(i) through (2)(f)(iii) of this Article or otherwise engaged in the implementation of Protected Space Operations as defined in paragraph (2)(e) above.

g. The term “Transfer Vehicle” means any vehicle that operates in space and transfers Payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A Transfer Vehicle also includes a vehicle that departs from and returns to the same location on a space object.

3. Cross-waiver of liability:

a. Each Party agrees to a cross-waiver of liability pursuant to which each Party waives all claims against any of the entities or persons listed in paragraphs (3)(a)(i) through (3)(a)(iv) of this Article based on Damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waiver shall apply to any claims for Damage, whatever the legal basis for such claims, against:

(i) Another Party;

(ii) A Partner State other than the United States of America;

(iii) A Related Entity of any entity identified in paragraph (3)(a)(i) or (3)(a)(ii) of this Article; or

(iv) The employees of any of the entities identified in paragraphs (3)(a)(i) through (3)(a)(iii) of this Article.

b. In addition, each Party shall, by contract or otherwise, extend the cross-waiver of liability, as set forth in paragraph (3)(a) of this Article, to its Related Entities by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs (3)(a)(i) through (3)(a)(iv) of this Article; and

(ii) Require that their Related Entities waive all claims against the entities or persons identified in paragraphs (3)(a)(i) through (3)(a)(iv) of this Article.

c. For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the Convention on International Liability for Damage Caused by Space Objects, which entered into force on September 1, 1972, where the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

d. Notwithstanding the other provisions of this Article, this cross-waiver of liability shall not be applicable to:

(i) Claims between a Party and its own Related Entity or between its own Related Entities;

(ii) Claims made by a natural person, his/her estate, survivors or subrogees (except when a subrogee is a Party to this Agreement or is otherwise bound by the

terms of this cross-waiver) for bodily injury to, or other impairment of health of, or death of, such person;

(iii) Claims for Damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for Damage resulting from a failure of a Party to extend the cross-waiver of liability to its Related Entities, pursuant to paragraph (3)(b) of this Article; or

(vi) Claims by a Party arising out of or relating to another Party's failure to perform its obligations under this Agreement.

e. Nothing in this Article shall be construed to create the basis for a claim or suit where none would otherwise exist.

2.2.9.1.3. Liability and Risk of Loss – Cross-Waiver (Cross-Waiver of Liability for Launch Agreements for Science or Space Exploration Activities Unrelated to the ISS Sample Clause) (Based on 14 CFR 1266.104).

1. The objective of this Article is to establish a cross-waiver of liability in the interest of encouraging participation in the exploration, exploitation, and use of outer space. The Parties intend that the cross-waiver of liability be broadly construed to achieve this objective.

2. For purposes of this Article:

a. The term "Damage" means:
(i) Bodily injury to, or other impairment of health of, or death of, any person;
(ii) Damage to, loss of, or loss of use of any property;
(iii) Loss of revenue or profits; or
(iv) Other direct, indirect, or consequential Damage.

b. The term "Launch Vehicle" means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries Payloads, persons, or both.

c. The term "Payload" means all property to be flown or used on or in a Launch Vehicle.

d. The term "Protected Space Operations" means all Launch Vehicle or Transfer Vehicle activities and Payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of an agreement for launch services. Protected Space Operations begins at the signature of this Agreement and ends when all activities done in implementation of this Agreement are completed. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of Launch Vehicles or Transfer Vehicles, Payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment and related facilities or services.

"Protected Space Operations" excludes activities on Earth that are conducted on return from space to develop further a Payload's product or process for use other than for the activities within the scope of an agreement for launch services.

e. The term "Related Entity" means:

(i) A contractor or subcontractor of a Party at any tier;

(ii) A user or customer of a Party at any tier; or

(iii) A contractor or subcontractor of a user or customer of a Party at any tier.

The terms "contractor" and "subcontractor" include suppliers of any kind.

The term "Related Entity" may also apply to a State, or an agency or institution of a State, having the same relationship to a Party as described in paragraphs 2(e)(i) through 2(e)(iii) of this Article, or otherwise engaged in the implementation of Protected Space Operations as defined in paragraph 2.d above.

f. The term "Transfer Vehicle" means any vehicle that operates in space and transfers Payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A Transfer Vehicle also includes a vehicle that departs from and returns to the same location on a space object.

3. Cross-waiver of liability:

a. Each Party agrees to a cross-waiver of liability pursuant to which each Party waives all claims against any of the entities or persons listed in paragraphs 3(a)(i) through 3(a)(iv) of this Article based on Damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waiver shall apply to any claims for Damage, whatever the legal basis for such claims, against:

i. the other Party;

ii. A party to another NASA agreement that includes flight on the same Launch Vehicle;

iii. A Related Entity of any entity identified in paragraphs 3(a)(i) or 3(a)(ii) of this Article; or

iv. The employees of any of the entities identified in paragraphs 3(a)(i) through 3(a)(iii) of this Article.

b. In addition, each Party shall extend the cross-waiver of liability, as set forth in paragraph 3.a of this Article, to its own Related Entities by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs 3(a)(i) through 3(a)(iv) of this Article; and
(ii) Require that their Related Entities waive all claims against the entities or persons identified in paragraphs 3(a)(i) through 3(a)(iv) of this Article.

c. For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the Convention on International Liability for Damage Caused by Space Objects, which entered into force on September 1, 1972, where the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

d. Notwithstanding the other provisions of this Article, this cross-waiver of liability shall not be applicable to:

(i) Claims between a Party and its own Related Entity or between its own Related Entities;

(ii) Claims made by a natural person, his/her estate, survivors, or subrogees (except when a subrogee is a Party to this Agreement or is otherwise bound by the terms of this cross-waiver) for bodily injury to, or other impairment of health of, or death of, such person;

(iii) Claims for Damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for Damage resulting from a failure of a Party to extend the cross-waiver of liability to its Related Entities, pursuant to paragraph 3.b of this Article; or

(vi) Claims by a Party arising out of or relating to another Party's failure to perform its obligations under this Agreement.

e. Nothing in this Article shall be construed to create the basis for a claim or suit where none would otherwise exist.

2.2.9.2.1. Liability and Risk of Loss (Unilateral Waiver Sample Clause)

1. Partner hereby waives any claims against NASA, its employees, its related entities, (including, but not limited to, contractors and subcontractors at any tier, grantees, investigators, customers, users, and their contractors and subcontractors, at any tier) and employees of NASA's related entities for any injury to, or death of, Partner employees or the employees of Partner's related entities, or for damage to, or loss of, Partner's property or the property of its related entities arising from or related to activities conducted under this Agreement, whether such injury, death, damage, or loss arises through negligence or otherwise, except in the case of willful misconduct.

2. Partner further agrees to extend this unilateral waiver to its related entities by requiring them, by contract or otherwise, to waive all claims against NASA, its related entities, and employees of NASA and employees of NASA's related entities for injury, death, damage, or loss arising from or related to activities conducted under this Agreement.

2.2.9.2.2. Liability and Risk of Loss (Insurance for Damage to NASA Property Short Form Sample Clause)

1. Partner shall, at no cost to NASA, maintain throughout the term of the Agreement, insurance covering loss of or damage to U.S. Government property as a result of any activities conducted under this Agreement. The policy must be on terms acceptable to NASA, and cover the cost of repair or replacement, or the fair market value of (as reasonably determined by NASA) any U.S. Government property (real or personal) damaged as a result of activities conducted under this Agreement, including performance by the U.S. Government or the U.S. Government's contractors or subcontractors, at any tier.

2. Partner shall, prior to conducting any activities under this agreement, furnish to NASA certificates and required endorsements evidencing such insurance. Said certificates shall state the amount of all deductibles and shall contain evidence that the policy or policies shall not be canceled or altered without at least thirty (30) calendar days prior written notice to NASA. It is understood and agreed that NASA shall be under no obligation to provide access to its facilities or equipment under this Agreement until the insurance required by this section has been obtained by Partner and accepted by NASA.

3. In the event U.S. Government property is damaged as a result of activities conducted under this agreement, Partner (as an insured loss payee) shall be solely responsible for the repair and restoration of such property subject to NASA direction. Partner's liability for such repair and restoration shall not exceed the agreed insurance policy limits.

2.2.9.2.3. Liability and Risk of Loss (Insurance for Damage to NASA Property Long Form Sample Clause)

1. Partner shall, at no cost to NASA, maintain throughout the terms of the Agreement, insurance to cover the loss of or Damage to U.S. Government property as a result of any activities conducted under this Agreement. The policy must cover the cost of replacing (at fair market value, as reasonably determined by NASA) or repairing any U.S. Government property (real or personal) Damaged as a result of any performance of this Agreement, including performance by the U.S. Government or its contractors or subcontractors, at any tier. "Damage" shall mean damage to, loss of, or loss of use of any property; soil, sediment, surface water, ground water, or other environmental contamination or damage; loss of revenue or profits; other direct damages; or any indirect, or consequential damage arising therefrom.

2. The insurance required under this subparagraph shall provide coverage in an amount acceptable to NASA. All terms and conditions in the policy shall be acceptable to NASA, and shall require 30 days notice to NASA of any cancellation or change affecting coverage. The policy shall cover all risks of loss except that it may exclude damage caused by the U.S. Government's willful misconduct. The insurance policy shall provide that the insurer waives its right as a subrogee against U.S. Government contractors, subcontractors, or related entities for damage.

3. Upon obtaining the insurance required under this paragraph, or upon obtaining any modification or amendment thereof, Partner shall personally deliver, or send by registered or certified mail, postage prepaid, two copies of such insurance policy, or such modification or amendment, to NASA at the following address, or at such address as NASA may, from time to time, designate in writing:

> National Aeronautics and Space Administration
> Attn: Associate General Counsel (Commercial and Intellectual Property Law)
> Washington, DC 20546
>
> Or
>
> [Chief Counsel's Office, where appropriate]

4. An insurance policy whose terms and conditions are reviewed and approved by NASA, or an agreement on an alternative method of protection, is a condition precedent to Partner's access to or use of U.S. Government property or U.S. Government services under this Agreement.

5. In the event Partner is unable to obtain insurance coverage required by subparagraph 1. above, the Parties agree to consider, subject to review, approval and agreement by NASA, alternative methods of protecting U.S. Government property (*e.g.*, by acceptable self-insurance or purchase of an appropriate bond).

6. In the event U.S. Government property is damaged as a result of activities conducted under this agreement, Partner (whether as an insured loss payee or under an alternate protection method) shall be solely responsible for the repair and restoration of such property subject to NASA direction. Partner's liability for such repair and restoration shall not exceed the agreed insurance policy or other protection method limits.

2.2.9.2.4. Liability and Risk of Loss (Insurance Protecting Third Parties Sample Clause)

1. For purposes of this article, the following definitions shall be applicable:

(a) "Liability" shall include payments made pursuant to United States' treaty or other international obligations, any judgment by a court of competent jurisdiction, administrative and litigation costs, and settlement payments.

(b) "Damage" shall mean bodily injury to, or other impairment of health of, or death of any person; damage to, loss of, or loss of use of any property; soil, sediment, surface water, ground water, or other environmental contamination or damage; loss of revenue or profits; other direct damages; or any indirect, or consequential damage arising therefrom.

2. Liability and Damage:

(a) Partner shall, at no cost to NASA, maintain insurance protecting the U.S. Government and U.S. Government contractors and subcontractors, at any tier, from any Liability as a result of any activities conducted under this Agreement, including launch and associated activities, resulting in Damage to:

(i) Partner's employees or agents; and
(ii) Third parties, including U.S. Government employees, and U.S. Government contractor and subcontractor employees.

(b) Insurance required under subparagraph 2.(a)(i) above may be satisfied through a liability insurance policy or policies under subparagraph 2.(a)(ii) above. Notwithstanding any other requirement for notice in this Agreement, upon obtaining the insurance required under subparagraph 2.(a), or upon obtaining any modification or amendment thereof, Partner shall personally deliver, or send by registered or certified mail, postage prepaid, two copies of such insurance policy, or such modification or amendment, to NASA at the following address, or at such address as NASA may from time to time designate in writing:

National Aeronautics and Space Administration
Attn: Associate General Counsel (Commercial and Intellectual Property Law)
Washington, DC 20546

Or, Chief Counsel's Office, where appropriate

(c) Partner shall maintain insurance with terms and conditions as are currently available in the market for reasonable insurance premiums, taking into account renewals, but shall not be obligated to provide insurance limits in excess of $500,000,000 coverage. Partner shall provide to NASA certificates of insurance, and associated policies, evidencing the insurance required thereunder within a reasonable time before Partner begins to use Government property or Government services. Unless Partner provides evidence that such a condition in an insurance policy is not available at a reasonable premium, the insurance policy shall provide for the right of the U.S. Government to settle reasonably a claim after consultation with Partner and its underwriters.

(d) Partner's insurance obtained pursuant to subparagraph 2.a. shall not be the exclusive recourse of the United States in the event Liability exceeds the amount of coverage. The United States reserves the right to bring an action against any responsible party for Liability incurred by the United States under domestic or international law.

(e) Each Party agrees to cooperate with the other in obtaining any information, data, reports, contracts, and similar materials in connection with the presentation or defense of any claim by either Party under any policy of insurance purchased to meet the requirements of this article. If the U.S. Government takes control of the defense of its interests, which would otherwise have been within Partner's responsibility as established in this article without the concurrence of Partner, Partner shall be released from any liability to the U.S. Government on account of the claim.

[Note: An agreement to support commercial launch activity, including launches licensed under the Commercial Space Launch Act (49 U.S.C. § 70101 et seq.), should also note that to the extent that the Department of Transportation (DOT) issues a license for certain activities with liability provisions different than those contained in the NASA Agreement, DOT's license takes precedence for those activities.]

2.2.10.1.1. Intellectual Property Rights - Data Rights (No Expected Proprietary Data Exchange Sample Clause)
(Note: Includes paragraphs 1-7)

1. General

(a) "Related Entity" as used in this Data Rights clause, means a contractor, subcontractor, grantee, or other entity having a legal relationship with NASA or Partner that is assigned, tasked, or contracted with to perform specified NASA or Partner activities under this Agreement.

(b) "Data," as used in this Data Rights clause, means recorded information, regardless of form, the media on which it may be recorded, or the method of recording. The term includes, but is not limited to, data of a scientific or technical nature, computer software and documentation thereof, and data comprising commercial and financial information.

(c) "Proprietary Data," as used in this Data Rights clause, means Data embodying trade secrets developed at private expense or comprising commercial or financial information that is privileged or confidential, and is marked with a suitable restrictive

notice, provided that such Data: is not known or available from other sources without obligations concerning its confidentiality; has not been made available by the owners to others without obligation concerning its confidentiality; is not already available to the Government without obligation concerning its confidentiality; has not been developed independently by persons who have had no access to the information; and, is not required to be disclosed pursuant to Federal statute, law, regulation, or valid court order.

(d) The Data rights set forth herein are applicable to employees of Partner and employees of any Related Entity of Partner. Partner shall ensure that its employees and employees of any Related Entity that perform Partner activities under this Agreement are aware of the obligations under this clause and that all such employees are bound to such obligations.

(e) Data exchanged between NASA and Partner under this Agreement will be exchanged without restriction as to its disclosure, use, or duplication except as otherwise provided in this clause.

(f) No preexisting Proprietary Data will be exchanged between the Parties under this Agreement unless specifically authorized in this clause or in writing by the owner of the Proprietary Data.

(g) In the event that Data exchanged between NASA and Partner include a restrictive notice that NASA or Partner deems to be ambiguous or unauthorized, NASA or Partner may notify the other Party of such condition. Notwithstanding such a notification, as long as the restrictive notice provides an indication that a restriction on use or disclosure was intended, the Party receiving such Data will treat the Data pursuant to the requirements of this clause unless otherwise directed in writing by the Party providing such Data.

(Nonreimbursable Alternate)

2. Data First Produced by Partner Under this Agreement

In the event Data first produced by Partner (or any Related Entity of Partner) in carrying out Partner responsibilities under this Agreement is furnished to NASA, and Partner considers such Data to be Proprietary Data, and such Data is identified with a suitable restrictive notice, NASA will use reasonable efforts to maintain the Data in confidence and such Data will be disclosed and used by or on behalf of the U.S. Government (under suitable protective conditions) only for U.S. Government purposes.

(Reimbursable Alternate)

2. Data First Produced by Partner Under this Agreement

In the event Data first produced by Partner (or any Related Entity of Partner) in carrying out Partner responsibilities under this Agreement is furnished to NASA, and Partner considers such Data to be Proprietary Data, and such Data is identified with a suitable restrictive notice, NASA will use reasonable efforts to maintain the Data in confidence and such Data will be disclosed and used by NASA and any Related Entity of NASA (under suitable protective conditions) only for carrying out NASA responsibilities under this Agreement. Upon completion of activities under this Agreement, such Data will be disposed of as requested by Partner.

(Nonreimbursable Alternate)

3. Data First Produced by NASA Under this Agreement

Except for data disclosing an invention owned by NASA for which patent protection is being considered, in the event Partner requests that Data first produced by NASA (or any Related Entity of NASA) in carrying out NASA's responsibilities under this Agreement be maintained in confidence, and to the extent NASA determines that such Data would be Proprietary Data if it had been obtained from Partner, NASA will mark such Data with a restrictive notice and will use reasonable efforts to maintain such marked Data in confidence for a period of *<insert a period of up to 5 years, typically 1 or 2 years>* after development of the Data, with the express understanding that during the aforesaid restricted period such marked Data may be disclosed and used (under suitable protective conditions) by or on behalf of the U.S. Government for U.S. Government purposes only, and thereafter for any purpose whatsoever without restriction on disclosure and use. Partner agrees not to disclose such marked Data to any third party without NASA's written approval until the aforesaid restricted period expires.

(Reimbursable Alternate)

3. Data First Produced by NASA under this Agreement

Except for data disclosing an invention owned by NASA for which patent protection is being considered, in the event Partner requests that Data first produced by NASA (or any Related Entity of NASA) in carrying out NASA's responsibilities under this Agreement be maintained in confidence, and to the extent NASA determines that such Data would be Proprietary Data if it had been obtained from Partner, NASA will mark such Data with a restrictive notice and will use reasonable efforts to maintain such marked Data in confidence for the duration of this Agreement, with the express understanding that during the aforesaid restricted period such marked Data may be disclosed and used by NASA and any Related Entity of NASA (under suitable protective conditions) only for carrying out NASA responsibilities under this Agreement. Upon completion of activities under this Agreement, such marked Data will be disposed of as requested by Partner.

(Nonreimbursable Alternate)

4. Publication of Results

Recognizing that section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2473), as amended, requires NASA to provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof, and that the dissemination of the results of NASA activities is one of the considerations for this Agreement, the Parties agree to coordinate proposed publication of results with each other in a manner that allows each Party a reasonable amount of time to review and comment on proposed publications.

(Reimbursable Alternate)
4. Publication of Results

(a) Recognizing that section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2473), as amended, requires NASA to provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof, and that the dissemination of the results of NASA activities is one of the considerations for this Agreement, NASA will coordinate proposed publication of results with Partner in a manner that allows Partner a reasonable amount of time to review and comment on proposed publications.

(b) Consistent with other obligations in this clause, NASA agrees that it will not publish any results without first receiving permission from Partner.

5. Data Disclosing an Invention

In the event Data exchanged between NASA and Partner discloses an invention for which patent protection is being considered, the furnishing Party specifically identifies such Data, and the disclosure and use of such Data is not otherwise limited or restricted herein, the receiving Party agrees to withhold such Data from public disclosure for a reasonable time (presumed to be 1 year unless mutually agreed otherwise or unless such information is restricted for a longer period herein) in order for patent protection to be obtained.

6. Copyright

In the event Data is exchanged with a notice indicating that the Data is copyrighted and there is no indication that such Data is subject to restriction under paragraphs 2 or 3 of this clause (*i.e.*, Data is not marked with a restrictive notice as required by paragraphs 2 or 3 of this clause), such Data will be presumed to be published and the following royalty-free licenses will apply.

(a) If it is indicated on the Data that the Data existed prior to, or was produced outside of, this Agreement, the receiving Party and others acting on its behalf, may reproduce, distribute, and prepare derivative works only for carrying out the receiving Party's responsibilities under this Agreement.

(b) If the Data does not contain the indication of (a) above, the Data will be presumed to have been first produced under this Agreement and, except as otherwise provided in paragraph 5 of this clause and in the Inventions and Patent Rights clause of this Agreement for protection of reported inventions, the receiving Party and others acting on its behalf may reproduce, distribute, and prepare derivative works for any purpose.

7. Data Subject to Export Control

Technical data, whether or not specifically identified or marked, that is subject to the export laws and regulations of the United States and that is provided to Partner under this Agreement will be treated as such, and will not be further provided to any foreign persons or transmitted outside the United States without proper U.S. Government authorization, where required.

2.2.10.1.2. Intellectual Property Rights - Data Rights (Proprietary Data Exchange Addendum)

(Note: Add the following provisions to the Data Rights Sample Clause 2.2.10.1.1.) (Note: Add subparagraphs 1(h)-(k) following subparagraph 1(g) of Sample Clause 2.2.10.1.1.)

(h) Notwithstanding any restriction on use, disclosure, or reproduction of Data provided in this clause, the Parties will not be restricted in the use, disclosure, or reproduction of Data provided under this Agreement that:

(i) is publicly available at the time of disclosure or thereafter becomes publicly available without breach of this Agreement;

(ii) is known to, in the possession of, or developed by the receiving Party independent of carrying out the receiving Party's responsibilities under this Agreement and independent of any disclosure of, or without reference to, Proprietary Data or otherwise protectable Data hereunder;

(iii) is received from a third party having the right to disclose such information without restriction; or

(iv) is required to be produced or released by the receiving Party pursuant to a court order or other legal requirement.

(i) If either NASA or Partner believes that any of the events or conditions that remove restriction on the use, disclosure, or reproduction of the Data apply, NASA or Partner will promptly notify the other Party of such belief prior to acting on such belief, and, in any event, will notify the other Party prior to an unrestricted use, disclosure, or reproduction of such Data.

(j) Disclaimer of Liability: Notwithstanding any restriction on use, disclosure, or reproduction of Data provided in this clause, NASA will not be restricted in, nor incur any liability for, the use, disclosure, or reproduction of any Data not identified with a suitable restrictive notice in accordance with paragraphs 1 (c), 2 and 8 of this clause or of any Data included in Data which Partner has furnished, or is required to furnish to the U.S. Government without restriction on disclosure and use.

(k) Partner may use the following, or a similar, restrictive notice as required by paragraphs 1(c), 2 and 8 of this clause. In addition to identifying Proprietary Data with such a restrictive notice, Partner should mark each page containing Proprietary Data with the following, or a similar, legend: "Proprietary Data – use and disclose only in accordance with notice on title or cover page."

Proprietary Data Notice

These data herein include <*enter as applicable*: "Background Data" or "Data Produced by Partner under a Space Act Agreement"> in accordance with the Data Rights provisions under Space Act Agreement <*provide applicable identifying information*> and embody Proprietary Data. In accordance with the Space Act Agreement, NASA will use reasonable efforts to maintain the data in confidence and limit use, disclosure, and reproduction by NASA and any Related Entity of NASA

in accordance with restrictions identified in the Space Act Agreement *<may list specific restrictions listed in the Agreement>*.

(Note: Add paragraphs 8-10 following paragraph 7 of Sample Clause 2.2.10.1.1)

8. Background Data

(a) In the event Partner furnishes NASA with Data developed at private expense (or in the case of state or local government, Data developed at government expense) that existed prior to, or was produced outside of, this Agreement, and such Data embody Proprietary Data, and such Data is so identified with a suitable restrictive notice, NASA will use reasonable efforts to maintain the Data in confidence and such Data will be disclosed and used by NASA and any Related Entity of NASA (under suitable protective conditions) only for carrying out NASA responsibilities under this Agreement. Upon completion of activities under this Agreement, such Data will be disposed of as requested by Partner.

(b) At the time of execution of this Agreement, the Parties agree that the following background data which embodies Proprietary Data that will be provided to NASA, may be used in the performance of this Agreement. This list may not be comprehensive, is subject to change during the course of the Agreement, and is not meant to supersede any restrictive markings which may be on the Data provided: *<insert specific listing of data items or, if none, insert "None" or "Not Applicable">*

9. Handling of Data

(a) In the performance of this Agreement, Partner and any Related Entity of Partner may have access to, be furnished with, or use the following categories of Data:

(i) Proprietary Data of third parties that the U.S. Government has agreed to handle under protective arrangements; or

(ii) U.S. Government Data, the use and dissemination of which, the U.S. Government intends to control.

(b) Data provided by NASA to Partner under the Agreement

(i) At the time of execution of this Agreement, the Parties agree that the following Proprietary Data of third parties will be provided to the Partner with the express understanding that Partner will use and protect such Data in accordance with this clause:

<insert specific listing of data items or, if none, insert "None" or "Not Applicable">

(ii) At the time of execution of this Agreement, the Parties agree that the following U.S. Government Data will be provided to Partner with the express understanding that Partner will use and protect such U.S. Government Data in accordance with this clause:

<insert specific listing of data items or, if none, insert "None" or "Not Applicable">

(iii) At the time of execution of this Agreement, the Parties agree that the following software and related Data will be provided to Partner under a separate Software Usage Agreement with the express understanding that Partner will use and protect such related Data in accordance with this clause. Unless retention of such Data is otherwise

authorized under the Software Usage Agreement or Partner has entered into a license, consistent with 37 C.F.R. Part 404, for software provided under this Agreement, upon completion of activities under this Agreement, such related Data will be disposed of as instructed by NASA:
<insert name and NASA Case No. of the software; if none, insert "None" or "Not Applicable" >

(c) With respect to such Data specifically identified in this Agreement or specifically marked with a restrictive notice, Partner agrees to:

(i) Use, disclose, or reproduce such Data only to the extent necessary to perform the work required under this Agreement;

(ii) Safeguard such Data from unauthorized use and disclosure;

(iii) Allow access to such Data only to its employees and any Related Entity that require access for their performance under this Agreement;

(iv) Except as otherwise indicated in (c)(iii) above, preclude access and disclosure of such Data outside Partner's organization;

(v) Notify its employees who may require access to such Data about the obligations under this clause and ensure that such employees comply with such obligations, and notify its Related Entity that may require access to such Data about their obligations under this clause; and

(vi) Return or dispose of such Data, as NASA may direct, when the Data is no longer needed for performance under this Agreement.

10. Oral and visual information

If information that Partner considers to be Proprietary Data is disclosed orally or visually to NASA, NASA will have no duty to limit or restrict, and will not incur any liability for, any disclosure or use of such information unless: (a) Partner orally informs NASA before initial disclosure that such information is considered to be Proprietary Data, and (b) Partner reduces such information to tangible, recorded form that is identified and marked with a suitable restrictive notice as required by paragraphs 1(c), 2 and 8 above and furnishes the resulting Data to NASA within 10 calendar days after such oral or visual disclosure.

Add paragraph 11 as applicable.

11. Classified Material

In the event that access to, acquisition of, or delivery of classified material is required under this Agreement, the Partner must provide a completed Contract Security Classification Specification (DD Form 254 or equivalent) to the NASA Point of Contact identified herein. Transmission and access to classified material shall be in accordance with NASA and U.S Federal Government statutes, regulations, and policies.

2.2.10.1.3. Intellectual Property Rights - Data Rights (Reimbursable SAA For the Benefit of a Foreign Entity Sample Clause)

1. General

(a) "Related Entity" as used in this Data Rights clause, means a contractor, subcontractor, grantee, or other entity having a legal relationship with NASA or Partner that is assigned, tasked, or contracted with to perform specified NASA or Partner activities under this Agreement.

(b) "Data," as used in this Data Rights clause, means recorded information, regardless of form, the media on which it may be recorded, or the method of recording. The term includes, but is not limited to, data of a scientific or technical nature, computer software and documentation thereof, and data comprising commercial and financial information.

(c) "Proprietary Data," as used in this Data Rights clause, means Data embodying trade secrets developed at private expense or comprising commercial or financial information that is privileged or confidential and is marked with a suitable restrictive notice, provided that such Data: is not known or available from other sources without obligations concerning its confidentiality; has not been made available by the owners to others without obligation concerning its confidentiality; is not already available to the Government without obligation concerning its confidentiality; has not been developed independently by persons who have had no access to the information; and, is not required to be disclosed pursuant to Federal statute, law, regulation, or valid court order.

(d) The Data rights set forth herein are applicable to employees of Partner and employees of any Related Entity of Partner. Partner shall ensure that its employees and employees of any Related Entity that perform Partner activities under this Agreement are aware of the obligations under this clause and that all such employees are bound to such obligations.

(e) Data exchanged between NASA and Partner under this Agreement will be exchanged without restriction as to its disclosure, use, or duplication except as otherwise provided in this clause.

(f) No preexisting Proprietary Data will be exchanged between the Parties under this Agreement unless specifically authorized in this clause or in writing by the owner of the Proprietary Data.

(g) In the event that Data exchanged between NASA and Partner include a restrictive notice that NASA or Partner deems to be ambiguous or unauthorized, NASA or Partner may notify the other Party of such condition. Notwithstanding such a notification, as long as the restrictive notice provides an indication that a restriction on use or disclosure was intended, the Party receiving such Data will treat the Data pursuant to the requirements of this clause unless otherwise directed in writing by the Party providing such Data.

(h) Notwithstanding any restriction on use, disclosure, or reproduction of Data provided in this clause, the Parties will not be restricted in the use, disclosure, or reproduction of Data provided under this Agreement that:

(i) is publicly available at the time of disclosure or thereafter becomes publicly available without breach of this Agreement;

(ii) is known to, in the possession of, or developed by the receiving Party independent of carrying out the receiving Party's responsibilities under this Agreement and independent of any disclosure of, or without reference to, Proprietary Data or otherwise protectable Data hereunder;

(iii) is received from a third party having the right to disclose such information without restriction; or

(iv) is required to be produced or released by the receiving Party pursuant to a court order or other legal requirement.

(i) If either NASA or Partner believes that any of the events or conditions that remove restriction on the use, disclosure, or reproduction of the Data apply, NASA or Partner will promptly notify the other Party of such belief prior to acting on such belief, and, in any event, will notify the other Party prior to an unrestricted use, disclosure, or reproduction of such Data.

(j) Disclaimer of Liability: Notwithstanding any restriction on use, disclosure, or reproduction of Data provided in this clause, NASA will not be restricted in, nor incur any liability for, the use, disclosure, or reproduction of any Data not identified with a suitable restrictive notice in accordance with paragraphs 1 (c), 2 and 7 of this clause or of any Data included in Data which Partner has furnished, or is required to furnish to the U.S. Government without restriction on disclosure and use.

(k) Partner may use the following, or a similar, restrictive notice as required by paragraphs 1 (c), 2 and 7 of this clause. In addition to identifying Proprietary Data with such a restrictive notice, Partner should mark each page containing Proprietary Data with the following, or a similar, legend: "Proprietary Data – use and disclose only in accordance with notice on title or cover page."

Proprietary Data Notice

These data herein include <*enter as applicable*: "Background Data" or "Data Produced by Partner under a Space Act Agreement"> in accordance with the Data Rights provisions under Space Act Agreement <*provide applicable identifying information*> and embody Proprietary Data.

2. Data First Produced by Partner Under this Agreement

In the event Data first produced by Partner in carrying out Partner responsibilities under this Agreement is furnished to NASA, and Partner considers such Data to be Proprietary Data, and such Data is identified with a suitable restrictive notice, NASA will use reasonable efforts to maintain the Data in confidence and such Data will be disclosed and used by or on behalf of the U.S. Government (under suitable protective conditions) for carrying out NASA responsibilities under this Agreement and thereafter for non-commercial, U.S. Government purposes only.

3. Data First Produced by NASA under this Agreement

Except for data disclosing an invention owned by NASA for which patent protection is being considered, in the event Partner requests that Data first produced by NASA (or any

Related Entity of NASA) in carrying out NASA's responsibilities under this Agreement be maintained in confidence, and to the extent NASA determines that such Data would be Proprietary Data if it had been obtained from Partner, NASA will mark such Data with a restrictive notice and will use reasonable efforts maintain such marked Data in confidence for a period of <*insert a period of up to 5 years, typically 1 or 2 years*> after development of the Data, with the express understanding that during the aforesaid restricted period such marked Data may be disclosed and used (under suitable protective conditions) by or on behalf of the U.S. Government for U.S. Government purposes only, and thereafter for any purpose whatsoever without restriction on disclosure and use. Partner agrees not to disclose such marked Data to any third party without NASA's written approval until the aforesaid restricted period expires.

4. Publication of Results

(a) The Parties recognize that section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2473), as amended, requires NASA to provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof, and that the dissemination of the results of NASA activities is one of the considerations for this Agreement. As such, NASA shall have the right to publish unclassified and non-Proprietary Data resulting from work performed under this Agreement. NASA will provide Partner a copy of proposed publications of results in a manner that allows Partner a reasonable amount of time to review and comment on proposed publications.

5. Data Disclosing an Invention

In the event Data exchanged between NASA and Partner discloses an invention for which patent protection is being considered, the furnishing Party specifically identifies such Data, and the disclosure and use of such Data is not otherwise limited or restricted herein, the receiving Party agrees to withhold such Data from public disclosure for a reasonable time (presumed to be 1 year unless mutually agreed otherwise or unless such information is restricted for a longer period herein) in order for patent protection to be obtained.

6. Copyright

In the event Data is exchanged with a notice indicating that the Data is copyrighted and there is no indication that such Data is subject to restriction under paragraphs 2 or 3 of this clause (*i.e.*, Data is not marked with a restrictive notice as required by paragraphs 2 or 3 of this clause), such Data will be presumed to be published and the following royalty-free licenses will apply.

(a) If it is indicated on the Data that the Data existed prior to, or was produced outside of, this Agreement, the receiving Party and others acting on its behalf, may reproduce, distribute, and prepare derivative works only for carrying out the receiving Party's responsibilities under this Agreement.

(b) If the Data does not contain the indication of (a) above, the Data will be presumed to have been first produced under this Agreement and, except as otherwise provided in

paragraph 5 of this clause and in the Inventions and Patent Rights clause of this Agreement for protection of reported inventions, the receiving Party and others acting on its behalf may reproduce, distribute, and prepare derivative works for any purpose.

7. Background Data

(a) In the event Partner furnishes NASA with Data developed at private expense that existed prior to, or was produced outside of, this Agreement, and such Data embody Proprietary Data (or in the case of a Partner that is a government entity, Data developed at government expense that existed prior to, or was produced outside of this Agreement, and which Data the Partner intends to control its use and dissemination), and such Data is so identified with a suitable restrictive notice, NASA will use reasonable efforts to maintain the Data in confidence, and such Data will be disclosed and used by NASA and any Related Entity of NASA (under suitable protective conditions) only for carrying out NASA responsibilities under this Agreement. Upon completion of activities under this Agreement, such Data will be disposed of as requested by Partner.

(b) At the time of execution of this Agreement, the Parties agree that the following background data, which embodies Proprietary Data that will be provided to NASA may be used in the performance of this Agreement. This list may not be comprehensive, is subject to change during the course of the Agreement, and is not meant to supersede any restrictive markings which may be on Data provided: *<insert specific listing of data items or, if none, insert "None" or "Not Applicable">*

8. Oral and visual information

If information that Partner considers to be Proprietary Data is disclosed orally or visually to NASA, NASA will have no duty to limit or restrict, and will not incur any liability for, any disclosure or use of such information unless: (a) Partner orally informs NASA before initial disclosure that such information is considered to be Proprietary Data, and (b) Partner reduces such information to tangible, recorded form that is identified and marked with a suitable restrictive notice as required by paragraphs 1 (c), 2 and 7 above and furnishes the resulting Data to NASA within 10 calendar days after such oral or visual disclosure.

2.2.10.1.4. Intellectual Property Rights - Data Rights (Free Exchange of Data Sample Clause)

NASA and Partner agree that the information and data exchanged in furtherance of the activities under this Agreement will be exchanged without use and disclosure restrictions unless required by national security regulations (e.g., classified information) or otherwise agreed to by NASA and Partner for specifically identified information or data (e.g., information or data specifically marked with a restrictive notice).

2.2.10.2. Intellectual Property Rights - Rights in Raw Data (Sample Clause)

1. Raw Data

Raw data (*i.e.*, unanalyzed data) generated under this Agreement will be reserved to Principal Investigators named in this Agreement (and Co-Investigators named in this Agreement, where appropriate) for scientific analysis and first publication rights for <*insert a period of time generally not more than 1 year*> beginning with receipt of the raw data and any associated data in a form suitable for analysis. NASA and Partner may also have access to, and use of, the raw data and any associated data during the agreed-upon period, but such access and use will not prejudice the first publication rights of the investigators identified in this Agreement.

2. Final Results

(a) Final results of the experiments performed under this Agreement will be made available to the scientific community through publication in appropriate journals or other established channels as soon as practicable and consistent with good scientific practice. In accordance with the Publication of Results provision of the Data Rights clause of this Agreement, the Parties agree to coordinate proposed publications with each other in a manner that allows each Party a reasonable time to review and comment on proposed publications.

(b) In the event such final results are published, NASA and Partner will have a royalty-free right to reproduce, distribute, and use such published work for any purposes. Partner agrees to notify the publisher of NASA's rights in the published work.

2.2.10.3.1. Intellectual Property Rights - Invention and Patent Rights (Short Form Sample Clause)

1. The invention and patent rights set forth herein are applicable to any employees, contractors, subcontractors, or other entities having a legal relationship with Partner that are assigned, tasked, or contracted with to perform specified Partner activities under this Agreement. Partner agrees to inform such employees, contractors, subcontractors, or other entities of the obligations under this clause and to bind them to such obligations.

2. Based on the purpose and scope of this Agreement, and the responsibilities of the Parties, NASA has made an administrative determination that the provisions of section 305(a) of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. § 2457(a)), do not apply to this Agreement. Therefore, title to inventions made (conceived or first actually reduced to practice) as a result of activities performed under this Agreement will remain with the respective inventing party(ies). No invention or patent rights are exchanged between or granted by such parties under this Agreement except that NASA and Partner agree to use reasonable efforts to identify and report to each other any invention that is believed to have been made jointly by employees of Partner and employees of NASA (including employees of such NASA contractors, subcontractors, or other entities), and to consult and agree as to the responsibilities and course of action to

be taken to establish and maintain patent protection on such invention and on the terms and conditions of any license or other rights to be exchanged or granted by or between NASA and Partner.

2.2.10.3.2. Intellectual Property Rights - Invention and Patent Rights (Long Form Sample Clause)

1. General

(a) "Related Entity" as used in this Invention and Patent Rights clause means a contractor, subcontractor, grantee, or other entity having a legal relationship with NASA or Partner that is assigned, tasked, or contracted with to perform specified NASA or Partner activities under this Agreement.

(b) Based on the purpose and scope of this Agreement, and the responsibilities of the Parties, NASA has made an administrative determination that the provisions of section 305(a) of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. § 2457(a)), do not apply to this Agreement. Therefore, title to inventions made (conceived or first actually reduced to practice) as a result of activities performed under this Agreement will remain with the respective inventing party(ies), and no invention or patent rights are exchanged between or granted by such parties under this Agreement except as provided herein.

(c) The invention and patent rights set forth herein are applicable to employees of Partner and employees of any Related Entity of Partner. Partner shall ensure that its employees and employees of any Related Entity that perform Partner activities under this Agreement are aware of the obligations under this clause and that all such employees are bound to such obligations.

2. NASA Inventions

Upon request, NASA will use reasonable efforts to grant Partner, consistent with the requirements of 37 C.F.R. Part 404, a license on terms to be subsequently negotiated to any NASA invention made as a result of activities performed under this Agreement on which NASA decides to file a patent application. This license will be subject to the rights reserved in paragraph 5(a) below.

3. NASA Related Entity Inventions

In the event that inventions are made under this Agreement by employees of a NASA Related Entity or jointly between NASA employees and employees of a NASA Related Entity, and NASA has the right to acquire or has acquired title to such inventions, NASA will use reasonable efforts to report such inventions. Upon request, NASA will use reasonable efforts to grant Partner, consistent with the requirements of 37 C.F.R. Part 404, a license on terms to be subsequently negotiated to any such invention on which NASA has acquired title and decides to file a patent application. This license will be subject to the rights reserved in paragraph 5(b) below.

4. Joint Inventions With Partner

NASA and Partner agree to use reasonable efforts to identify and report to each other, and to cooperate with each other in obtaining patent protection on, any inventions made jointly between NASA employees (or employees of a NASA Related Entity) and employees of Partner. Upon timely request, NASA may, at its sole discretion and subject to the applicable rights reserved in paragraph 5 below:

(a) agree to refrain from exercising its undivided interest in a manner inconsistent with Partner's commercial interests; or

(b) use reasonable efforts to grant Partner, consistent with the requirements of 37 C.F.R. Part 404, an exclusive or partially exclusive license on terms to be subsequently negotiated to NASA's undivided interest in such joint inventions.

(Nonreimbursable Alternate)

5. Rights to be Reserved in Partner's License

Any license granted to Partner pursuant to paragraphs 2, 3, or 4 above will be subject to the reservation of the following rights:

(a) As to inventions made solely or jointly by NASA employees, NASA reserves the irrevocable, royalty-free right of the Government of the United States to practice the invention or have the invention practiced on behalf of the United States or on behalf of any foreign government or international organization pursuant to any existing or future treaty or agreement with the United States.

(b) As to inventions made solely or jointly by employees of a NASA Related Entity, NASA reserves the rights as set forth in paragraph (a) above, as well as the revocable, nonexclusive, royalty-free license in the Related Entity as set forth in 14 C.F.R. § 1245.108 or 37 C.F.R. § 401.14 (e), as applicable.

(Reimbursable Alternate)

5. Rights to be Reserved in Partner's License

Any license granted to Partner pursuant to paragraphs 2, 3, or 4 above will be subject to the reservation of the following rights:

(a) As to inventions made solely or jointly by NASA employees, NASA reserves the irrevocable, royalty-free right of the Government of the United States to practice the invention or have the invention practiced on behalf of the United States or on behalf of any foreign government or international organization pursuant to any existing or future treaty or agreement with the United States. NASA will use reasonable efforts to limit use of the invention to use by or on behalf of NASA for research, experimental, or evaluation purposes.

(b) As to inventions made solely or jointly by employees of a NASA Related Entity, NASA reserves the rights as set forth in paragraph (a) above, as well as the revocable, nonexclusive, royalty-free license in the Related Entity as set forth in 14 C.F.R. § 1245.108 or 37 C.F.R. § 401.14 (e), as applicable.

6. Protection of Reported Inventions

When inventions are reported and disclosed between the Parties in accordance with the provisions of this clause, the receiving Party agrees to withhold such reports or disclosures from public access for a reasonable time (presumed to be 1 year unless otherwise mutually agreed or unless such information is restricted for a longer period herein) in order to facilitate the allocation and establishment of the invention and patent rights under these provisions.

7. Patent Filing Responsibilities and Costs

(a) The invention and patent rights set forth herein will apply to any patent application filed and any patent obtained covering an invention made as a result of the performance of activities under this Agreement. Each Party is responsible for its own costs of obtaining and maintaining patents covering sole inventions of its employees; except that NASA and Partner may mutually agree otherwise, upon the reporting of any invention (sole or joint) or in any license granted, as to responsibilities and course of action to be taken to establish and maintain patent protection on such invention.

(b) Partner agrees to include the following statement in any patent application it files for an invention made jointly between NASA employees (or employees of a NASA Related Entity) and employees of Partner:

> The invention described herein may be manufactured and used by or for the U.S. Government for U.S. Government purposes without the payment of royalties thereon or therefore.

Add paragraph 8 as applicable.

8. Related Inventions

(a) For the purposes of this paragraph, a related invention is an invention related to the subject matter of this Agreement, but not made as a result of activities performed under this Agreement, that is covered by a patent application or patent owned by NASA or Partner. To the extent NASA related invention(s) are known and identified in paragraphs (b) or (d) below, upon request, and to the extent such related inventions are available for licensing, NASA may enter into negotiations with Partner for a license to such related invention(s) consistent with the requirements of 37 C.F.R. Part 404.

(b) At the time of execution of this Agreement, the Parties agree that the following inventions are related inventions:
<Fill in and indicate which party owns the related invention; if none, insert "None" or "Not Applicable">

(c) Related Computer Software: Where a related invention in the form of computer software is provided by NASA to Partner, such software will be provided under a separate Software Usage Agreement. Partner agrees to maintain such software in confidence and use it only for carrying out Partner responsibilities under this Agreement. Unless Partner has entered into a license, consistent with 37 C.F.R. Part 404, for software

provided under this Agreement, upon completion of activities under this Agreement, all copies of such software will be disposed of as instructed by NASA.

(d) At the time of execution of this Agreement, the Parties agree that the following software is related computer software that will be provided to Partner in accordance with paragraph (c) above:
<Fill in name and NASA Case No. of the software; if none, insert "None" or "Not Applicable">

[Note: Partner should be informed that it can locate NASA technology available for licensing by visiting the following website address – http://technology.nasa.gov.]

2.2.10.3.3. Intellectual Property Rights - Invention and Patent Rights (Section 305(a) Sample Clause)

1. Definitions

(a) "Administrator," as used in this clause, means the Administrator of the National Aeronautics and Space Administration (NASA) or duly authorized representative.

(b) "Patent Representative" as used in this clause means the NASA *<enter Center name>* Patent Counsel (or Chief Counsel at Centers with no Patent Counsel). Correspondence with the Patent Representative under this clause will be sent to the address below:

Patent Counsel *<or enter other NASA official if no Patent Counsel>*
<enter mailing address>

(c) "Invention," as used in this clause, means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the U.S.C.

(d) "Made," as used in relation to any invention, means the conception or first actual reduction to practice such invention.

(e) "Practical application," as used in this clause, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(f) "Related Entity" as used in this clause means a contractor, subcontractor, grantee, or other entity having a legal relationship with NASA or Partner that is assigned, tasked, or contracted with to perform specified NASA or Partner activities under this Agreement.

(g) "Manufactured substantially in the United States," as used in this clause, means the product must have over 50 percent of its components manufactured in the United States. This requirement is met if the cost to Partner of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all components required to make the product. (In making this determination only the product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with Federal

Acquisition Regulation 25.103(a) and (b) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

2. Allocation of principal rights

(a) *Presumption of title in Partner inventions.*

(i) Any invention made by Partner under this Agreement shall be presumed to have been made in the manner specified in paragraph (1) or (2) of section 305(a) (42 U.S.C. § 2457(a)) of the National Aeronautics and Space Act of 1958 (hereinafter called "the Act"), and the above presumption shall be conclusive unless at the time of reporting such invention Partner submits to the Patent Representative a written statement, containing supporting details, demonstrating that the invention was not made in the manner specified in paragraph (1) or (2) of section 305(a) of the Act.

(ii) Regardless of whether title to such an invention would otherwise be subject to an advance waiver or is the subject of a petition for waiver, Partner may nevertheless file the statement described in paragraph 2(a)(i) of this clause. The Administrator (or his designee) will review the information furnished by Partner in any such statement and any other available information relating to the circumstances surrounding the making of the invention and will notify Partner whether the Administrator has determined that the invention was made in the manner specified in paragraph (1) or (2) of section 305(a) of the Act.

(b) *Property rights in Partner inventions*. Each invention made under this Agreement for which the presumption of paragraph 2(a)(i) of this clause is conclusive or for which there has been a determination that it was made in the manner specified in paragraph (1) or (2) of section 305(a) of the Act shall be the exclusive property of the United States as represented by NASA unless the Administrator waives all or any part of the rights of the United States to Partner, as provided in paragraph 2(c) of this clause.

(c) *Waiver of rights*.

(i) The NASA Patent Waiver Regulations, 14 C.F.R. Part 1245, Subpart 1, have adopted the Presidential Memorandum on Government Patent Policy of February 18, 1983, as a guide in acting on petitions (requests) for waiver of rights under section 305(f) of the Act to any invention or class of inventions made or that may be made in the manner specified in paragraphs (1) or (2) of section 305(a) of the Act.

(ii) As provided in 14 C.F.R. Part 1245, Subpart 1, Partner may petition, either prior to execution of the Agreement or within 30 days after execution of the Agreement, for advance waiver of rights to any or all of the inventions that may be made by Partner under this Agreement. If such a petition is not submitted, or if after submission it is denied, Partner (or an employee inventor of Partner) may petition for waiver of rights to an identified subject invention within eight months of first disclosure of invention in accordance with paragraph 5(b) of this clause or within such longer period as may be authorized in accordance with 14 C.F.R. 1245.105. Further procedures are provided in paragraph 10 of this clause.

(d) *NASA inventions*.

(i) Title to inventions made by NASA (or NASA Related Entity) as a result of activities performed under this Agreement will remain with the respective inventing

party(ies), and no invention or patent rights are granted by such parties under this Agreement except as provided herein.

(ii) Upon request, NASA will use reasonable efforts to grant Partner, consistent with the requirements of 37 C.F.R. Part 404, a license on terms to be subsequently negotiated to any NASA invention made as a result of activities performed under this Agreement on which NASA decides to file a patent application.

(iii) Upon request, NASA will use reasonable efforts to grant Partner, consistent with the requirements of 37 C.F.R. Part 404, a license on terms to be subsequently negotiated to any invention made under this Agreement by employees of a NASA Related Entity, or jointly between NASA employees and employees of a NASA Related Entity, on which NASA has acquired title and decides to file a patent application.

3. Minimum rights reserved by the Government

(a) With respect to each Partner invention made under this Agreement for which a waiver of rights is applicable in accordance with 14 C.F.R. Part 1245, Subpart 1, the Government reserves:

(i) An irrevocable, royalty-free license for the practice of such invention throughout the world by or on behalf of the United States or any foreign government in accordance with any treaty or agreement with the United States; and

(ii) Such other rights as stated in 14 C.F.R. 1245.107.

(b) Nothing contained in this paragraph shall be considered to grant to the Government any rights with respect to any invention other than an invention made under this Agreement.

4. Minimum rights to Partner

(a) Partner is hereby granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on an invention made by Partner under this Agreement and any resulting patent in which the Government acquires title, unless Partner fails to disclose such invention within the times specified in paragraph 5(b) of this clause. Partner's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which Partner is a party and includes the right to grant sublicenses of the same scope to the extent Partner was legally obligated to do so at the time the Agreement was awarded. The license is transferable only with the approval of the Administrator except when transferred to the successor of that part of Partner's business to which the invention pertains.

(b) Partner's domestic license may be revoked or modified by the Administrator to the extent necessary to achieve expeditious practical application of such invention pursuant to an application for an exclusive license submitted in accordance with 37 C.F.R. Part 404, Licensing of Government Owned Inventions. This license will not be revoked in that field of use or the geographical areas in which Partner has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the Administrator to the extent Partner, its licensees, or its domestic

subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(c) Before revocation or modification of the license, Partner will be provided a written notice of the Administrator's intention to revoke or modify the license, and Partner will be allowed 30 days (or such other time as may be authorized by the Administrator for good cause shown by Partner) after the notice to show cause why the license should not be revoked or modified. Partner has the right to appeal, in accordance with 14 C.F.R. 1245.112, any decision concerning the revocation or modification of its license.

5. Invention identification, disclosures, and reports

(a) Partner shall establish and maintain active and effective procedures to assure that inventions made under this Agreement are promptly identified and disclosed to Partner personnel responsible for the administration of this clause within six months of conception or first actual reduction to practice, whichever occurs first in the performance of work under this Agreement. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception or the first actual reduction to practice of such inventions, and records that show that the procedures for identifying and disclosing such inventions are followed. Upon request, Partner shall furnish the Patent Representative a description of such procedures for evaluation and for determination as to their effectiveness.

(b) Partner will disclose each such invention to the Patent Representative within two months after the inventor discloses it in writing to Partner personnel responsible for the administration of this clause or, if earlier, within six months after Partner becomes aware that such an invention has been made, but in any event before any on sale, public use, or publication of such invention known to Partner. The Partner shall use the NASA electronic New Technology Reporting system (eNTRe), accessible at http://entre.nasa.gov, to disclose inventions. The invention disclosure shall identify this Agreement and shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of any such invention and whether a manuscript describing such invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to NASA, Partner will promptly notify NASA of the acceptance of any manuscript describing such an invention for publication or of any on sale or public use planned by Partner for such invention.

(c) Partner shall furnish the Patent Representative the following:

(i) Interim reports every 12 months (or such longer period as may be specified by the Patent Representative) from the date of the Agreement, listing inventions made under this Agreement during that period, and certifying that all such inventions have been disclosed (or that there are no such inventions) and that the procedures required by paragraph 5(a) of this clause have been followed.

(ii) A final report, within three months after completion of the work, listing all inventions made under this Agreement or certifying that there were no such inventions,

and listing all subcontracts or other agreements with a Related Entity containing a patent and invention rights clause (as required under paragraph 7 of this clause) or certifying that there were no such subcontracts or other agreements.

(iii) Interim and final reports shall be submitted electronically at the eNTRe Web-site http://entre.nasa.gov.

(d) Partner agrees, upon written request of the Patent Representative, to furnish additional technical and other information available to Partner as is necessary for the preparation of a patent application on an invention made under this Agreement in which the Government retains title and for the prosecution of the patent application, and to execute all papers necessary to file patent applications on such inventions and to establish the Government's rights in the inventions.

(e) Protection of reported inventions. When inventions made under this Agreement are reported and disclosed to NASA in accordance with the provisions of this clause, NASA agrees to withhold such reports or disclosures from public access for a reasonable time (presumed to be 1 year unless otherwise mutually agreed) in order to facilitate the allocation and establishment of the invention and patent rights under these provisions.

6. Examination of records relating to inventions

(a) The Patent Representative or designee shall have the right to examine any books (including laboratory notebooks), records, and documents of Partner relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this Agreement to determine whether -

(i) Any such inventions were made in performance of this Agreement;

(ii) Partner has established and maintained the procedures required by paragraph 5(a) of this clause; and

(iii) Partner and its inventors have complied with the procedures.

(b) If the Patent Representative learns of an unreported Partner invention that the Patent Representative believes may have been made under this Agreement, Partner may be required to disclose the invention to NASA for a determination of ownership rights.

(c) Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentiality of the information involved.

7. Subcontracts or Other Agreements

(a) (i) Unless otherwise authorized or directed by the Patent Representative, Partner shall include this *Invention and Patent Rights* clause (suitably modified to identify the parties) in any subcontract or other agreement with a Related Entity hereunder (regardless of tier) for the performance of experimental, developmental, or research work.

(ii) In the case of subcontracts or other agreements at any tier, NASA, the Related Entity, and Partner agree that the mutual obligations of the parties created by this clause constitute privity of contract between the Related Entity and NASA with respect to those matters covered by this clause.

(b) In the event of a refusal by a prospective Related Entity to accept such a clause, Partner:

(i) Shall promptly submit a written notice to the Patent Representative setting forth the prospective Related Entity's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontract or other agreement without the written authorization of the Patent Representative.

(c) Partner shall promptly notify the Patent Representative in writing upon the award of any subcontract or other agreement with a Related Entity (at any tier) containing an invention and patent rights clause by identifying the Related Entity, the applicable invention and patent rights clause, the work to be performed under the subcontract or other agreement, and the dates of award and estimated completion. Upon request of the Patent Representative, Partner shall furnish a copy of such subcontract or other agreement, and, no more frequently than annually, a listing of the subcontracts or other agreements that have been awarded.

(d) The Related Entity will retain all rights provided for Partner in the *Invention and Patent Rights* clause included under paragraph 7(a) of this clause in any subcontract or other agreement, and Partner will not, as part of the consideration for awarding the subcontract or other agreement, require any Related Entity to assign its rights in inventions made under this Agreement to Partner.

(e) Notwithstanding paragraph 7(d) of this clause, and in recognition of Partner's substantial contribution of funds, facilities or equipment to the work performed under this Agreement, Partner is authorized, subject to the rights of NASA set forth elsewhere in this clause, to:

(i) Acquire by negotiation and mutual agreement rights to an invention made under this Agreement by a Related Entity as Partner may deem necessary to obtaining and maintaining of private support; and

(ii) Request, in the event of inability to reach agreement pursuant to paragraph 7(e)(i) of this clause, that NASA request that such rights for Partner be included as an additional reservation in a waiver granted pursuant to 14 C.F.R. Part 1245, Subpart 1. Any such requests to NASA should be prepared in consideration of the following guidance and submitted to the Patent Representative. The Related Entity should be advised that unless it requests a waiver of title pursuant to the NASA Patent Waiver Regulations (14 C.F.R. Part 1245, Subpart 1), NASA will acquire title to inventions made under this Agreement. If a waiver is not requested or granted, Partner may request a license from NASA consistent with the requirements of 37 C.F.R. Part 404. A Related Entity requesting a waiver must follow the procedures set forth in paragraph 10 of this clause.

8. Preference for United States manufacture

Partner agrees that any products embodying inventions made under this Agreement or produced through the use of such inventions shall be manufactured substantially in the United States. However, in individual cases, the requirement to manufacture substantially in the United States may be waived by the Patent Representative upon a showing by Partner that under the circumstances domestic manufacture is not commercially feasible.

9. March-in rights

Partner agrees that, with respect to any invention made under this Agreement in which it has acquired title, NASA has the right in accordance with the procedures in 37 C.F.R. 401.6 and any supplemental regulations of NASA to require Partner, or an assignee or exclusive licensee of such an invention, to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Partner, assignee or exclusive licensee refuses such a request NASA has the right to grant such a license itself, if NASA determines that:

(a) Such action is necessary because Partner, assignee, or exclusive licensee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of such invention in such field of use;

(b) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by Partner, assignee, or exclusive licensee;

(c) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by Partner, assignee, or exclusive licensee; or

(d) Such action is necessary because the agreement required by paragraph 8 of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any such invention in the United States is in breach of such agreement.

10. Requests for Waiver of Rights

(a) In accordance with the NASA Patent Waiver Regulations, 14 C.F.R. Part 1245, Subpart 1, waiver of rights to any or all inventions made or that may be made under this Agreement may be requested at different time periods. Advance waiver of rights to any or all such inventions may be requested prior to the execution of the Agreement, or within 30 days after execution thereof. In addition, waiver of rights to an identified invention made and reported under this Agreement may be requested, even though a request for an advance waiver was not made or, if made, was not granted.

(b) Each request for waiver of rights shall be by petition to the Administrator and shall include an identification of the petitioner; place of business and address; if petitioner is represented by counsel, the name, address, and telephone number of the counsel; the signature of the petitioner or authorized representative; and the date of signature. No specific forms need be used, but the request should contain a positive statement that waiver of rights is being requested under the NASA Patent Waiver Regulations; a clear indication of whether the request is for an advance waiver or for a waiver of rights for an individual identified invention; whether foreign rights are also requested and, if so, for which countries, and a citation of the specific section(s) of the regulations under which such rights are requested; and the name, address, and telephone number of the party with whom to communicate when the request is acted upon.

(c) All petitions for waiver, whether advanced or individual petitions, will be submitted to the Patent Representative designated in this clause.

(d) A Petition submitted in advance of this Agreement will be forwarded by the Patent Representative to the Inventions and Contributions Board. The Board will consider the petition, and where the Board makes the findings to support the waiver, the Board will recommend to the Administrator that waiver be granted, and will notify the petitioner and the Patent Representative of the Administrator's determination. The Patent Representative will be informed by the Board whenever there is insufficient time or information or other reasons to permit a decision to be made on a petition for an advance waiver without unduly delaying the execution of the Agreement. In the event a petition for an advance waiver is not granted or is not decided upon before execution of the Agreement, the petitioner will be so notified by the Patent Representative. All other petitions will be processed by the Patent Representative and forwarded to the Board. The Board shall notify the petitioner of its action, and if waiver is granted, the conditions, reservations, and obligations thereof will be included in the Instrument of Waiver. Whenever the Board notifies a petitioner of a recommendation adverse to, or different from, the waiver requested, the petitioner may request reconsideration under procedures set forth in the regulations.

2.2.10.4.1. Patent and Copyright Use - Authorization and Consent (Sample Clause)

In order to avoid any possible interruption in the conduct of this Agreement, NASA hereby gives the U.S. Government's authorization and consent (without prejudice to any rights of indemnification) for all use and manufacture of any invention or work covered by a U.S. patent or copyright in the performance of Partner responsibilities under this Agreement, including the performance of such responsibilities by any Related Entity of Partner.

2.2.10.4.2. Patent and Copyright Use - Indemnification (Sample Clause)

In the event the U.S. Government incurs any liability for the infringement of privately owned U.S. patents or copyrights and such liability is incurred as a result of performance of Partner responsibilities by Partner or any Related Entity of Partner, Partner agrees to indemnify and hold the U.S. Government harmless against such liability, including costs and expenses incurred by the U.S. Government in defending against any suit or claim for such infringements.

2.2.11. Use of NASA Name, Initials and Emblems and Release of General Information to the Public (Sample Clause)

1. NASA Name and Initials

Partner agrees the words "National Aeronautics and Space Administration" and the letters "NASA" will not be used in connection with a product or service in a manner reasonably calculated to convey any impression that such product or service has the authorization, support, sponsorship, or endorsement of NASA, which does not, in fact, exist. In addition, with the exception of release of general information in accordance with paragraph 3 below, Partner agrees that any proposed public use of the NASA name

or initials (including press releases resulting from activities conducted under this Agreement and all promotional and advertising use) shall be submitted by Partner in advance to the NASA Assistant Administrator for Public Affairs or designee ("NASA Public Affairs") for review and approval. Approval by NASA Public Affairs shall be based on applicable law and policy governing the use of the NASA name and initials.

2. NASA Emblems

Use of NASA emblems/devices (*i.e.*, NASA Seal, NASA Insignia, NASA logotype, NASA Program Identifiers, and the NASA Flag) are governed by 14 C.F.R. Part 1221. Partner agrees that any proposed use of such emblems/devices shall be submitted to NASA Public Affairs for review and approval in accordance with such regulations.

3. Release of General Information to the Public

NASA or Partner may, consistent with Federal law and this Agreement, release general information regarding its own participation in this Agreement as desired.

2.2.12.1. Disclaimer of Warranty (Sample Clause)

Equipment, facilities, technical information, and services provided by NASA under this Agreement are provided "as is." NASA makes no express or implied warranty as to the condition of such equipment, facilities, technical information, or services, or as to the condition of any research or information generated under this Agreement, or as to any products made or developed under or as a result of this Agreement including as a result of the use of information generated hereunder, or as to the merchantability or fitness for a particular purpose of such research, information, or resulting product, or that the equipment, facilities, technical information, or services provided will accomplish the intended results or are safe for any purpose including the intended purpose, or that any of the above will not interfere with privately owned rights of others. Neither the government nor its contractors shall be liable for special, consequential or incidental damages attributed to such equipment, facilities, technical information, or services provided under this Agreement or such research, information, or resulting products made or developed under or as a result of this Agreement.

2.2.12.2. Disclaimer of Endorsement (Sample Clause)

NASA does not endorse or sponsor any commercial product, service, or activity. NASA's participation in this Agreement or supply of equipment, facilities, technical information, or services under this Agreement does not constitute endorsement by NASA. Partner agrees that nothing in this Agreement will be construed to imply that NASA authorizes, supports, endorses, or sponsors any product or service of Partner resulting from activities conducted under this Agreement, regardless of the fact that such product or service may employ NASA-developed technology.

2.2.13. Compliance with Laws and Regulations (Sample Clause)

The Parties shall comply with all applicable laws and regulations including, but not limited to, safety, security, export control, and environmental laws and regulations. Access by Partner to a NASA facilities or property, or to a NASA Information Technology (IT) system or application, is contingent upon compliance with NASA security and safety policies and guidelines including, but not limited to, standards on badging, credentials, and facility and IT system/application access.

With respect to any export control requirements:

(a) The Parties will comply with all U.S. export control laws and regulations, including the International Traffic in Arms Regulations (ITAR), 22 CFR Parts 120 through 130, and the Export Administration Regulations (EAR), 15 CFR Parts 730 through 799, in performing work under this Annex to this Agreement. In the absence of available license exemptions/exceptions, the Partner shall be responsible for obtaining the appropriate licenses or other approvals, if required, for exports of hardware, technical data and software, or for the provision of technical assistance.

(b) The Partner shall be responsible for obtaining export licenses, if required, before utilizing foreign persons in the performance of work under this Agreement or any Annex to this Agreement, including instances where the work is to be performed on-site at NASA and where the foreign person will have access to export-controlled technical data or software.

(c) The Partner will be responsible for all regulatory record keeping requirements associated with the use of licenses and license exemptions or exceptions.

(d) The Partner will be responsible for ensuring that the provisions of this Article apply to its Related Entities.

2.2.14.1 Term of Agreement (Sample Clause)

This Agreement becomes effective upon the date of the last signature below and shall remain in effect until the completion of all obligations of both Parties hereto, or # (1-5) years from the date of the last signature, whichever comes first.

2.2.14.2 Term of Task (Annex Sample Clause)

This Annex becomes effective upon the date of the last signature below and shall remain in effect until the completion of all obligations of both Parties hereto, or (#1-5) year(s) from the date of the last signature, whichever comes first, unless such term exceeds the duration of the Umbrella Agreement. The term of this Annex shall not exceed the term

of the Umbrella Agreement. The Annex is automatically expired upon the expiration of the Umbrella Agreement.

2.2.15.1. Right to Terminate (Nonreimbursable Agreement Sample Clause)

Either Party may unilaterally terminate this Agreement by providing 30 calendar days written notice to the other Party.

2.2.15.2. Right to Terminate (Reimbursable Agreement Sample Clause)

Either Party may unilaterally terminate this Agreement by providing 30 calendar days written notice to the other Party. In the event of such termination, Partner will be obligated to reimburse NASA for all costs for which the Partner was responsible and that have been incurred in support of this Agreement up to the date the termination notice is received by the non-terminating Party. Where Partner terminates this Agreement, Partner will also be responsible for termination costs.

2.2.15.3. Right to Terminate (Reimbursable Agreement Requiring High Certainty of Support Sample Clause)

1. NASA's commitment under this Agreement to make available government property and services required by Partner may be terminated by NASA, in whole or in part, (a) upon a declaration of war by the Congress of the United States, or (b) upon a declaration of a national emergency by the President of the United States, or (c) upon Partner's failure to make payments as set forth in the "Financial Obligations" clause, or (d) upon Partner's failure to meet its obligations under the Agreement, or (e) upon a NASA determination, in writing, that NASA is required to terminate such services for reasons beyond its control. For purposes of this article, reasons beyond NASA's control are reasons which make impractical or impossible NASA's or its contractors' or subcontractors' performance of this Agreement. Such reasons include, but are not limited to, acts of God or of the public enemy, acts of the U.S. Government other than NASA, in either its sovereign or contractual capacity (to include failure of Congress to appropriate sufficient funding), fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or unusually severe weather.

2. In the event of termination for reasons given above, NASA will seek to provide reasonable advance notice and will seek to mitigate the effect of such termination, if possible, and will enter into discussions with Partner for that purpose. For the use of property or services provided for on a fixed-price basis, the costs incurred by the United States, including termination costs, shall not exceed the fixed price of the services which would have been provided had termination not taken place. For use of property or services provided on a cost basis, Partner will be liable for all costs, consistent with law and NASA policy, which are incurred by the U.S. Government in the provision of property or services, including termination costs associated with the Agreement activities.

3. NASA shall not be liable for any costs, loss of profits, revenue, or other direct, indirect, or consequential damages incurred by Partner, its contractors, subcontractors, or customers as a result of the termination by NASA pursuant to paragraph 1 of this section.

4. Partner shall have the right to terminate, in whole or in part, this Agreement at any time. In the event of such termination, Partner will be obligated to reimburse NASA for all Government costs which have been incurred up to the effective date of Partner's notice of termination and are incurred as a result of such termination.

5. This article is not intended to limit or govern the right of NASA or Partner in accordance with law, to terminate its performance under this Agreement, in whole or in part, for Partner's or NASA's breach of a provision in this Agreement.

2.2.15.4 Right to Terminate (Nonreimbursable Umbrella Agreement Sample Clause)

Either Party may unilaterally terminate this Umbrella Agreement or any Annex(es) by providing 30 calendar days written notice to the other Party. Termination of an Annex does not terminate this Umbrella Agreement. However, the termination or expiration of this Umbrella Agreement also constitutes the termination of all outstanding Annexes.

2.2.15.5 Right to Terminate (Reimbursable Umbrella Agreement Sample Clause)

Either Party may unilaterally terminate this Umbrella Agreement or any Annex(es) by providing 30 calendar days written notice to the other Party. Termination of an Annex does not terminate this Umbrella Agreement. However, the termination or expiration of this Umbrella Agreement also constitutes the termination of all outstanding Annexes. In the event of such termination, Partner will be obligated to reimburse NASA for all costs for which the Partner was responsible and that have been incurred in support of this Agreement up to the date the termination notice is received by the non-terminating Party. Where Partner terminates this Agreement, Partner will also be responsible for termination costs.

2.2.16. Continuing Obligations (Sample Clause)

The rights and obligations of the Parties that, by their nature, would continue beyond the expiration or termination of this Agreement, e.g., "Liability and Risk of Loss" and "Intellectual Property Rights" [and "Financial Obligations" if reimbursable] shall survive such expiration or termination of this Agreement.

2.2.17.1 Management Points of Contacts (Sample Clause)

The following personnel are designated as the principal points of contact between the Parties in the performance of this Agreement. Technical points of contact may also be identified. In addition, Principal Investigators should be identified if the Intellectual Property Rights – Rights in Raw Data sample clause (2.2.10.2) is used.

NASA	Partner
Name	Name
Title	Title
Email	Email
Telephone	Telephone
Cell	Cell
Fax	Fax
Address	Address

2.2.17.2. Technical Points of Contact (Annex Sample Clause)

The following personnel are designated as the principal points of contact between the Parties in the performance of this Annex.

NASA	Partner
Name	Name
Title	Title
Email	Email
Telephone	Telephone
Cell	Cell
Fax	Fax
Address	Address

2.2.18. Dispute Resolution (Sample Clause)

Except as otherwise provided in the article entitled "Priority of Use," the article entitled "Intellectual Property Rights – Invention and Patent Rights" (for those activities governed by 37 C.F.R. Part 404), and those situations where a pre-existing statutory or regulatory system exists (*e.g.* under the Freedom of Information Act, 5 U.S.C. § 552), all disputes concerning questions of fact or law arising under this Agreement shall be referred by the claimant in writing to the appropriate person identified in this Agreement as the "Management Points of Contact." The persons identified as the "Management Points of Contact" for NASA and the Partner will consult and attempt to resolve all issues arising from the implementation of this Agreement. If they are unable to come to agreement on any issue, the dispute will be referred to the signatories to this Agreement, or their designees, for joint resolution. If the Parties remain unable to resolve the dispute, then the NASA signatory or that person's designee, as applicable will issue a written decision that will be the final agency decision for the purpose of judicial review. Nothing in this section limits or prevents either Party from pursuing any other right or remedy available by law upon the issuance of the final agency decision.

2.2.19. Mishap Investigation (Sample Clause)

In the case of a mishap or mission failure, the Parties agree to provide assistance to each other in the conduct of any investigation. For all NASA mishaps, Partner agrees to

comply with NPR 8621.1, "NASA Procedural Requirements for Mishap Reporting, Investigating, and Recordkeeping" and [insert Center safety policies, as appropriate].

2.2.20. Modifications (Sample Clause)

Any modification to this Agreement shall be executed, in writing, and signed by an authorized representative of NASA and the Partner. Any modification that creates an additional commitment of NASA resources must be signed by the original NASA signing official, or successor, or a higher level NASA official possessing original or delegated authority to make such a commitment.

2.2.21. Assignment (Sample Clause)

Neither this Agreement nor any interest arising under it will be assigned by the Partner or NASA without the express written consent of the officials executing this Agreement.

2.2.22. Applicable Law (Sample Clause)

U.S. Federal law governs this Agreement for all purposes, including, but not limited to, determining the validity of the Agreement, the meaning of its provisions, and the rights, obligations and remedies of the Parties.

2.2.23. Independent Relationship (Sample Clause)

This Agreement is not intended to constitute, create, give effect or otherwise recognize a joint venture, partnership, or formal business organization, or agency agreement of any kind, and the rights and obligations of the Parties shall be only those expressly set forth herein.

2.2.24. Loan of Government Property (Sample Clause)

1. In order to further activities set forth in this Agreement, the Parties acknowledge that NASA shall lend the following Government property to Partner:
<Insert List of Lent Property>

2. The property listed above (hereinafter referred to as the “Property”) is not being provided to Partner as a substitute for the purchasing of the same type of property by Partner under any contract or grant that Partner has, or may have, with a third party. Furthermore, such Property is not excess to NASA's requirements and its use is anticipated upon its return to NASA.

3. In support of this loan the Partner shall:
(a) Install, operate, and maintain the Property at Partner’s expense;
(b) Furnish all utilities (e.g., water, electricity) and operating materials required for the operation of the Property;
(c) Bear all costs associated with the use and enjoyment of the Property under the

terms of this Agreement, including but not limited to such costs as packing, crating, shipping, installing, maintaining, licensing, and operating the Property;

(d) Transport the Property in accordance with good commercial practice;

(e) Acknowledge that the privilege of using and enjoying the said Property exists solely by virtue of this Agreement with NASA, the owner of said Property, and not as of right;

(f) Identify, mark, and record all of the Property promptly upon receipt, and maintain such identity so long as it remains in the custody, possession, or control of Partner.

(g) Maintain suitable records for each item of Property. As a minimum, such records shall show description, identification number, unit cost, quantity, dates of receipt, condition upon receipt, and location. Partner shall perform an inventory of the Property one (1) year from the effective date of this Agreement, and every year thereafter, if the Agreement is still in effect, and send such inventory report to NASA. The report shall include a statement validating any requirement to continue the loan. Further, Partner shall provide to NASA upon reasonable request, records sufficient to disclose the date of inspections, the deficiencies discovered as a result of inspections, and the maintenance actions performed. This annual report shall be submitted to the following NASA point of contact (POC): <Insert POC Information>

(h) Report any loss, damage, or destruction of Property to the NASA POC identified above within ten (10) working days from the date of the discovery thereof.

Note: If required, the following clause can be added to the end of the previous clause:
(i) Assume responsibility for loss or damage to the Property, reasonable wear and tear excepted, and, with the same limitation for wear and tear, agree to return the Property to NASA in as good condition as when received. It is understood that Partner is responsible for any damage to the Property while it is in the care, custody, and control of Partner, its employees, contractors, subcontractors, agents, or principal investigators.

2.2.26. Signatory Authority (Sample Clause)

The signatories to this Agreement covenant and warrant that they have authority to execute this Agreement. By signing below, the undersigned agrees to the above terms and conditions.

Approval:

NASA-[Center initials]	**Partner**
_____	_____
Name	**Name**
Title	**Title**
_____	_____
Date	**Date**

CHAPTER 3. NONREIMBURSABLE AND REIMBURSABLE AGREEMENTS WITH FEDERAL/STATE/LOCAL GOVERNMENT ENTITIES

3.1. GENERAL GUIDANCE

The Space Act provides authority for NASA to enter into nonreimbursable and reimbursable SAAs with agencies of the Federal Government and with state/local governments, including state and local colleges and universities (public partners).[48] These agreements constitute a formal statement of understanding between NASA and the public partner requiring NASA programmatic or institutional activities to accomplish the purpose of the SAA.

3.2. AGREEMENTS WITH STATE/LOCAL GOVERNMENT ENTITIES

The approach for these binding interagency SAAs with state and local government entities is generally the same as those entered into with private parties.[49] Therefore, the guidance and clauses in Chapter 2 should be followed. *Note*: Regarding use of the liability and risk clauses in section 2.2.9.1, to the extent that a state or local government entity is required to waive claims, especially for ISS and launch agreements for science or space exploration, it may be prudent to verify the entity's authority to waive claims on behalf of the state. For example, state universities are provided certain authorities by the state which are generally found in their articles of incorporation. A review of these articles may provide evidence of any such required authority.

3.3. AGREEMENTS WITH FEDERAL GOVERNMENT ENTITIES

The approach for these binding interagency agreements is generally the same as those entered into with private parties.[50] Therefore, the guidance and clauses in Chapter 2 should be followed unless the clause is listed below. For these clauses, NASA takes a slightly different approach than is provided in the sample clauses in Chapter 2: Authority and Parties, Financial Obligations, Priority of Use, Liability and Risk of Loss, Intellectual Property Rights, Right to Terminate, Dispute Resolution, Loan of Government Property, if applicable, and Signatory Authority.

Sometimes, a draft agreement is provided by another Federal entity that is not consistent with the SAA clauses that NASA employs in its agreements. Since Federal entities do not sue each other and the risk of a dispute is mitigated, some flexibility in the wording of the clauses is permitted if the legal meaning is consistent with NASA authorities. Any questions regarding agreements with Federal entities should be referred to the Office of External Relations, which is the office responsible for reviewing all agreements with

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[48] 42 U.S.C. § 2473(c).

[49] Where NASA is interested in a nonbinding agreement with a domestic public entity, appropriate clauses from Chapter 2 should be modified to reflect the parties lack of intent to commit.

[50] See footnote 34.

other U.S. Federal Agencies.[51] Questions concerning NASA's legal authorities can be referred to the Office of the General Counsel of Chief Counsel, as appropriate.

3.3.1. AUTHORITY AND PARTIES: This section cites the legal authority for NASA and the other Federal entity to enter into the agreement. In addition, the parties are identified by name and address.

3.3.1. Authority and Parties (Sample Clause)

3.3.2. FINANCIAL OBLIGATIONS: Depending on the type of agreement, nonreimbursable or reimbursable, one of the following sample clauses can be used. Usually, each Agency funds its own portion of the cooperation (nonreimbursable SAA) unless specifically provided otherwise. Where each Agency funds its own work, Financial Obligations - Nonreimbursable Agreement sample clause 3.3.2.1 is used.

3.3.2.1. Financial Obligations (Nonreimbursable Agreement Sample Clause)

In general, as specified in section 2.2.6 above, before NASA may perform reimbursable work, an amount sufficient to fund the reimbursable work (either in full or divided by task order) must be received by NASA in advance of initiation of NASA's efforts. However, for agreements with other Federal entities, while the preference is that payment will be made in advance of initiation of NASA's efforts, NPD 1050.1H provides that NASA may initiate activities prior to receipt of payment.

3.3.2.2. Financial Obligations (Reimbursable Agreement Sample Clause)

3.3.3. PRIORITY OF USE: This section ensures that NASA and the other Federal entity do not become legally committed to perform the activities according to any schedule stated in the agreement, in the event other Federal priorities or interests arise. It provides that, in the event of a conflict in scheduling the Federal resources, either party determines which usage of its own resources takes priority.

3.3.3. Priority of Use (Sample Clause)

3.3.4. LIABILITY AND RISK OF LOSS: Since NASA does not sue other Federal entities, and vice-versa, liability normally is allocated by having each party assume its own risks.[52] As appropriate, the risk of liability can be otherwise allocated as agreed by the parties.

3.3.4. Liability and Risk of Loss (Sample Clause)

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[51] NPD1050.1H (5)(c).

[52] Where the agreement activities may result in a significant impact on the environment, the agreement should address how the National Environmental Policy Act (NEPA) requirements will be met, to include which party will be the lead agency or whether a formal cooperating agency relationship will be established (*see* NPR 8580.1).

3.3.5. INTELLECTUAL PROPERTY RIGHTS: When the partner to the agreement is a Federal entity, a simplified approach to intellectual property rights is sufficient to protect NASA's interests. Sample clauses for the allocation and protection of rights are discussed in four areas: (1) data rights; (2) handling of data; (3) invention and patent rights; and (4) release of general information to the public and media. For additional guidance related to intellectual property rights, see Chapter 2, section 2.2.10.

Normally, Federal entities exchange data and information without any use and disclosure restrictions, except as required by law. Thus, the Free Exchange of Data sample clause (2.2.10.1.4) will be used in most agreements with other Federal entities.

2.2.10.1.4. Intellectual Property Rights – Data Rights (Free Exchange of Data Sample Clause)

However, where there is a likelihood that NASA and the other Federal entity will exchange third party proprietary data or data (including software) that NASA or the other Federal entity intend to control, the Handling of Data sample clause (3.3.5.1) may also be used.

3.3.5.1. Intellectual Property Rights - Handling of Data (Sample Clause)

The Invention and Patent Rights sample clauses (3.3.5.2) should normally be included in all agreements with other Federal entities. This clause recognizes that custody and administration of an invention remains with the inventing agency, but the invention is owned by the U.S. Government rather than any single Federal entity. Additionally, NASA and the other Federal entity agree to consult about future actions to establish patent protection for joint inventions.

3.3.5.2. Intellectual Property Rights - Invention and Patent Rights (Sample Clause)

If applicable, a clause may be included in agreements with other Federal entities that provides for the public release of general information about activities being conducted under the agreement. To the extent press releases are desired, the agreement should include sample clause 3.3.5.3, which addresses the appropriate process for the release of general information to the public and media by either party.

3.3.5.3. Release of General Information to the Public and Media (Sample Clause)

3.3.6. Right to Terminate: This clause incorporates the standard conditions under which either party may terminate an SAA. For reimbursable agreements, a clause is

included addressing termination costs, consistent with OMB guidance on "Business Rules for Intragovernmental Transactions."[53]

3.3.6. Right to Terminate (Sample Clause)

3.3.7. DISPUTE RESOLUTION: This clause outlines the dispute resolution procedures to be followed for agreements with other Federal entities. It incorporates guidance provided by OMB on "Business Rules for Intragovernmental Transactions."

3.3.7. Dispute Resolution (Sample Clause)

3.3.8. LOAN OF GOVERNMENT PROPERTY: This clause outlines the responsibilities that accompany the loan of government property to either another Federal Entity, or NASA as part of the Agreement activities.

3.3.8. Loan of Government Property (Sample Clause)

3.3.9. SIGNATORY AUTHORITY: This clause provides a signature block, as well as the typed name, title, and date of signature for the responsible signing official of each Federal entity. Two original copies should be signed by both parties. During the negotiations, care should be taken to identify and confirm the appropriate senior managers are signing for each Agency, both in terms of management responsibilities and signatory authority. As a general rule, the signing officials should have similar levels of management responsibility. With respect to signatory authority, in contrast to agreements with non-Federal entities, the concept of "apparent authority," an element of the law of Agency, does not apply to Federal agreements. An official must have actual (original or delegated) authority to create legal obligations for a Federal agency.

3.3.9. Signatory Authority (Sample Clause)

[53] OMB Memorandum M-07-03 on "Business Rules for Intragovernmental Transactions" Nov. 13, 2006; Treasury Financial Manual Bulletin No. 2007-03, Vol. 1, "Intragovernmental Business Rules" Oct. 31, 2007.

APPENDIX 3. SAMPLE CLAUSES – NONREIMBURSABLE AND REIMBURSABLE AGREEMENTS WITH FEDERAL GOVERNMENT ENTITIES

3.3.1. Authority and Parties (Sample Clause)

NASA/Center enters into this Agreement in accordance with the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. § 2473 (c). NASA is located at [provide address]. [Other Federal Entity] enters into this Agreement in accordance with [provide citation to legal authority]. [Other Federal Entity] is located at [provide address]. NASA/Center and [Other Federal Entity] may be individually referred to as a "Party" and collectively referred to as the "Parties."

3.3.2.1. Financial Obligations - Nonreimbursable Agreement (Sample Clause).

There will be no transfer of funds or other obligations between NASA and Partner in connection with this Agreement. Each Party will fund its own participation under this Agreement. All activities under or pursuant to this Agreement are subject to the availability of appropriated funds and the Parties' respective funding procedures.

3.3.2.2. Financial Obligations - Reimbursable Agreement (Sample Clause).

NASA shall be reimbursed by Partner in connection with the provision of goods or services in accordance with law. Payment should be made by Partner in advance of initiation of NASA's efforts [for incremental payments, insert payment schedule]. NASA will not provide services or incur costs beyond the funding provided under this Agreement. All activities under or pursuant to this Agreement are subject to the availability of appropriated funds and the Parties' respective funding procedures.

3.3.3. Priority of Use (Sample Clause)

Any schedule or milestone in this Agreement is estimated based upon the Parties' current understanding of the projected availability of their personnel, facilities and equipment. In the event that either party's projected availability changes, the other party shall be given reasonable notice of that change, so that the schedule and milestones may be adjusted accordingly. The Parties agree that its usage own of any facilities, equipment, and personnel shall have priority over the usage planned in this Agreement. Should a conflict arise, the responsible Federal Entity, in its sole discretion shall determine whether to exercise that priority.

3.3.4. Liability and Risk of Loss (Sample Clause).

Each Party agrees to assume liability for its own risks arising from or related to activities conducted under this Agreement.

3.3.5.1. Intellectual Property Rights - Handling of Data (Sample Clause).

1. In the performance of this Agreement, NASA or Partner (as the Disclosing Party) may provide the other (as the Receiving Party) with:
(a) data of third parties that the Disclosing Party has agreed to handle under protective arrangements or is required to protect under the Trade Secrets Act (18 U.S.C. 1905), or
(b) Government data, the use and dissemination of which, the Disclosing Party intends to control.

2. Data provided by Disclosing Party under the Agreement
(a) At the time of execution of this Agreement, the Parties agree that the following data of third parties will be provided by the Disclosing Party to the Receiving Party with the express understanding that the Receiving Party will use and protect such data in accordance with this clause:
[*insert specific listing of data items and identify the Disclosing and Receiving Party, or if none, insert "None" or "Not Applicable"]*
(b) At the time of execution of this Agreement, the Parties agree that the following U.S. Government data will be provided by the Disclosing Party to the Receiving Party with the express understanding that the Receiving Party will use and protect such U.S. Government data in accordance with this clause:
[*insert specific listing of data items and identify the Disclosing and Receiving Party, or if none, insert "None" or "Not Applicable"]*
(c) At the time of execution of this Agreement, the Parties agree that the following software and related data will be provided by the Disclosing Party to the Receiving Party under a separate Software Usage Agreement with the express understanding that the Receiving Party will use and protect such related data in accordance with this clause.
[insert name of the software and identify the Disclosing and Receiving Party; or if none, insert "None" or "Not Applicable]

3. With respect to data specifically identified in this clause or specifically marked with a restrictive notice, the Receiving Party agrees to:
(a) Use, disclose, or reproduce such data only to the extent necessary to perform the work required under this Agreement;
(b) Safeguard such data from unauthorized use or disclosure.
(c) Allow access to such data only to its employees, contractors, or subcontractors that require access for their performance under this Agreement;
(d) Except as otherwise indicated in 3(c) above, preclude access and disclosure of such data outside the Receiving Party's organization;
(e) Notify its employees who may require access to such data about the obligations under this clause and ensure that such employees comply with such obligations, and notify its contractors or subcontractors that may require access to such data about their obligations under this clause; and
(f) Return or dispose of such data, as the Disclosing Party may direct, when the data is no longer needed for performance under this Agreement.

4. In the event that data exchanged between the Parties include a legend that NASA or Partner deems to be ambiguous or unauthorized, NASA or Partner may inform the other Party of such condition. Notwithstanding such a legend, as long as such legend provides an indication that a restriction on use or disclosure was intended, the Receiving Party shall treat such data pursuant to the requirements of this clause unless otherwise directed, in writing, by the Providing Party.

5. Notwithstanding any restrictions on use, disclosure, or reproduction of data provided in this clause, the Parties will not be restricted in the use, disclosure, and reproduction of any data that: (a) is publicly available at the time of disclosure or becomes publicly available without breach of this Agreement; (b) is known to, in the possession of, or developed by the receiving Party independent of carrying out the receiving Party's responsibilities under this Agreement and independent of any disclosure of, or without reference to, proprietary data or otherwise protectable data hereunder; (c) is received from a third Party having the right to disclose such information without restriction; or (d) is required to be produced by the receiving Party pursuant to a court order or other legal requirement. If either NASA or Partner believes that any of the events or conditions that remove restriction on the use, disclosure, and reproduction of the data apply, NASA or Partner will promptly notify the other Party of such belief prior to acting on such belief, and, in any event, will notify the other Party prior to an unrestricted use, disclosure, or reproduction of such data.

3.3.5.2. Intellectual Property Rights - Patent and Invention Rights (Sample Clause).

Unless otherwise agreed by NASA and Partner, custody and administration of inventions made (conceived or first actually reduced to practice) as a consequence of, or in direct relation to, the performance of activities under this Agreement will remain with the respective inventing Party. In the event an invention is made jointly by employees the Parties (including by employees of a Party's contractors or subcontractors for which the U.S. Government has ownership), NASA and Partner will consult and agree as to future actions toward establishment of patent protection for the invention.

3.3.5.3. Release of General Information to the Public and Media (Sample Clause).

NASA or Partner may, consistent with Federal law and this Agreement, release general information regarding its own participation in this Agreement as desired. Insofar as participation of the other Party is involved, NASA and Partner will seek to consult with each other prior to any releases, consistent with the Parties' respective policies.

3.3.6. Right to Terminate (Sample Clause)

Either Party may unilaterally terminate this Agreement by providing 30 calendar days written notice to the other Party. In the event of such termination, Partner will be obligated to reimburse NASA for all costs for which the Partner was responsible and that have been incurred in support of this Agreement up to the date the termination notice is received by the non-terminating Party. Where Partner terminates this Agreement, NASA

is authorized to collect costs incurred prior to termination, plus any termination costs, up to the total payment amount provided for under this Agreement.

3.3.7. Dispute Resolution (Sample Clause).

Except as otherwise provided in the article entitled "Priority of Use," the article entitled "Intellectual Property Rights – Invention and Patent Rights" (for those activities governed by 37 C.F.R. Part 404), and those situations where a pre-existing statutory or regulatory system exists (*e.g.* under the Freedom of Information Act, 5 U.S.C. § 552), all disputes concerning questions of fact or law arising under this Agreement shall be referred by the claimant in writing to the appropriate person identified in this Agreement as the "Management Points of Contact." The persons identified as the "Management Points of Contact" for NASA and the Partner will consult and attempt to resolve all issues arising from the implementation of this Agreement. If they are unable to come to agreement on any issue, the dispute will be referred to the signing officials, or their designees, for joint resolution after the Parties have separately documented in writing clear reasons for the dispute. As applicable, disputes will be resolved pursuant to the provisions of the Business Rules for Intragovernmental Transactions delineated in the Treasury Financial Manual, Vol. 1, Bulletin 2007-03, Section VII (Resolving Intragovernmental Disputes and Differences).

3.3.8. Loan of Government Property (Sample Clause)

1. In order to further activities set forth in this Agreement, the Parties acknowledge that [NASA or other Federal Entity] shall lend the following Government property to [Other Federal Entity or NASA, as appropriate]:

<Insert List of Lent Property. If both parties are lending property, provide 2 separate lists.>

2. Furthermore, such Property is not excess to NASA's [or Other Federal Entity's] requirements and its use is anticipated upon its return to NASA [or Other Federal Entity, as appropriate.

3. In support of this loan the [Other Federal Entity or NASA, as appropriate] shall:

(a) Install, operate, and maintain the Property at Federal Entity's expense;

(b) Furnish all utilities (e.g., water, electricity) and operating materials required for the operation of the Property;

(c) Bear all costs associated with the use and enjoyment of the Property under the terms of this Agreement, including but not limited to such costs as packing, crating, shipping, installing, maintaining, licensing, and operating the Property;

(d) Transport the Property in accordance with good commercial practice;

(e) Acknowledge that the privilege of using and enjoying the said Property exists solely by virtue of this Agreement with [NASA or other Federal Entity, as appropriate], the owner of said Property, and not as of right;

(f) Identify, mark, and record all of the Property promptly upon receipt, and maintain such identity so long as it remains in the custody, possession, or control of Partner.

(g) Maintain suitable records for each item of Property. As a minimum, such records shall show description, identification number, unit cost, quantity, dates of receipt,

condition upon receipt, and location. Partner shall perform an inventory of the Property one (1) year from the effective date of this Agreement, and every year thereafter, if the Agreement is still in effect, and send such inventory report to [NASA or Other Federal Entity, as appropriate]. The report shall include a statement validating any requirement to continue the loan. Further, [Other Federal Entity or NASA, as appropriate] shall provide to [NASA or Other Federal Entity, as appropriate] upon reasonable request, records sufficient to disclose the date of inspections, the deficiencies discovered as a result of inspections, and the maintenance actions performed. This annual report shall be submitted to the following [NASA or Other Federal Entity, as appropriate] point of contact (POC): <Insert POC Information>

(h) Report any loss, damage, or destruction of Property to the POC identified above within ten (10) working days from the date of the discovery thereof.

3.3.9. Signatory Authority (Sample Clause).

Approved and Authorized on Behalf of Each Party by:

NASA/Center

Name
Title
Date

[Other Federal Entity]

Name
Title
Date

CHAPTER 4. AGREEMENTS WITH FOREIGN ENTITIES

4.1. GENERAL GUIDANCE

NASA has independent legal authority under the Space Act to conclude executive agreements on behalf of the U.S. to conduct aeronautical and space activities with other nations (*see* section 1.1). Executive agreements are International SAAs binding under international law. For executive agreements, NASA's foreign partners are typically government agencies or international organizations because only these entities have legal capacity to enter into binding agreements under international law. Where a foreign agency or international organization is authorized to make binding commitments on behalf of its respective government, NASA will usually execute an SAA under international law. An International SAA may be a Memorandum of Understanding (MOU), discussed further in section 4.2 below, or a letter agreement (LOA), discussed further in section 4.3 below. Under NASA's International SAAs, NASA and the participating foreign entity are referred to as "party" or "parties."

If a governmental entity lacks legal capacity to execute agreements binding under international law, an exchange of diplomatic notes with the party's government may be required to conclude the agreement, or the agreement can be signed at the government level (*e.g.* foreign ministries). Alternatively, the International SAA should specify U.S. Federal law as the applicable law for all purposes including interpretation.[54] Otherwise, the International SAA is very similar to an executive agreement.

NASA also enters into International SAAs with foreign nongovernmental organizations, including universities, institutes and commercial entities, and occasionally with foreign persons. Such an International SAA is usually very similar to the executive agreements discussed in this Chapter except that the International SAAs should specify that U.S. Federal law is the applicable law.

Regardless of whether international law or U.S. Federal law governs the SAA, NASA's performance of its responsibilities under any SAA is always subject to applicable U.S. laws.

It is NASA's policy to engage in international cooperative projects that provide technical, scientific, economic, or foreign policy benefits to the U.S. Such projects could comprise foreign participation in NASA activities, NASA participation in foreign activities, as well as joint international collaborative efforts. Each international cooperative effort should

[54] As referenced in section 1.1, NASA has independent legal authority under the Space Act to conclude International Agreements under international law and, therefore, prefers that agreements with its foreign partners be governed by international law rather than U.S. law. In circumstances involving a partner's lack of reciprocal legal capacity to conclude agreements binding under international law, however, U.S. law is chosen to ensure that the agreement can be legally binding. Stated differently, the practice is to select the law of the State of the party having legal capacity to conclude binding international agreements, rather than the party lacking such capacity.

contribute to NASA's overall program objectives, including maintenance and enhancement of U.S. industrial competitiveness, and should be within the scientific, technical, and budgetary capabilities of each party. Generally, NASA's cooperative activities with foreign entities are not directed to the joint development of technology, or products or processes that are potentially of near-term commercial value.

Organizationally, OER is responsible for overall policy coordination for all of NASA's international cooperative projects and determines, in consultation with the Department of State, when an agreement is subject to the requirements of the Case-Zablocki Act (*see* section 4.2). The appropriate Program Office is responsible for the technical, scientific, programmatic, and management aspects of the joint activity. Execution of an agreement should be treated as any other important early program milestone by a Program Office. Early consultation with the Headquarters Office of the General Counsel (OGC) is critical for ensuring all aspects of the cooperation are consistent with applicable law and legal policy.[55] Attorneys from Headquarters OGC will assist and advise OER during the negotiation of the text with a foreign entity as necessary.

Every international project involving a commitment of NASA resources should be embodied in a legally binding SAA or other legally binding instrument. NASA resources committed to a project could include, for example, time and effort of personnel, support services, use of facilities, equipment, information, and, where appropriate, funding. The SAA should describe each party's individual responsibilities, technically and financially, for each clearly defined element of the project. It should also establish clearly defined managerial and technical interfaces and provisions for the protection of proprietary or otherwise sensitive technology. A well defined SAA will result in each party retaining intellectual property rights in the technology/hardware it has developed independently of the other party. In contrast, scientific results are shared between the cooperating parties and are made available to the international community. Specific policy and procedural guidelines to be followed in entering into international cooperative agreements are contained in NPD 1360.2A: "Initiation and Development of International Cooperation in Space and Aeronautics Programs."[56]

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[55] Any agreement with a foreign entity should be executed well in advance of the commencement of significant joint activities. NASA assumes unnecessary legal risk if project activities, such as exchange of detailed technical data or equipment, or use of each other's facilities take place without a legally binding agreement in place to appropriately allocate risk of loss or damage, and impose conditions on treatment and use of technical data. In some cases, interim agreements may be put in place to cover such areas as liability or preliminary exchanges of data and equipment prior to the completion of the final SAA.

[56] *See also* NPD 1050.1H, "Authority To Enter Into Space Act Agreements," section 5.c.:
The Assistant Administrator for External Relations (OER) is responsible for the negotiation, execution (which may include signature and a separate entry-into-force process), amendment, and termination of International Agreements; for the review of all Agreements with other U.S. Federal Agencies; for the selection of Agreement Managers for International Agreements; and for storing all Agreements within his/her jurisdiction.

4.2. INTERNATIONAL NONREIMBURSABLE AGREEMENT - MOU

A Memorandum of Understanding (MOU) is used by U.S./NASA for bilateral[57] or multilateral executive agreements with foreign governments, foreign governmental entities, and international organizations addressing activities that are significant in scope[58] and intended to bind both parties under international law.[59] The MOU must also be procedurally consistent with the Case-Zablocki Act, (1 U.S.C. § 112(b)), and implementing regulations, (22 C.F.R. Part 181).[60] Before executing an international MOU, review by the Department of State, as described in 22 C.F.R. Part 181, the "Circular 175 process," must be completed. (*See* State Department Foreign Affairs Manual 11 FAM Chapter 700 (September 2006)). If not immediately effective upon signature, these MOUs often enter into force through exchange of diplomatic notes between the U.S. Government and that of the other country. [61] This occurs either because that country requires this added step or because, in a previous Circular 175 review, such confirmation has been determined to be necessary to make the agreement legally binding (*i.e.*, it has previously been determined that a particular agency does not have the authority to enter into an agreement binding under international law). Sometimes the foreign partner's legal system requires additional steps after signature of the MOU for it to become effective. In some cases this can be a period of years. However, NASA and the foreign partner often need to begin working on the cooperative effort in advance of the MOU becoming effective. In these instances, NASA and the foreign partner can sometimes agree to provisional application of the MOU.

It is also worth noting that there is a statutory provision requiring NASA to solicit comment through the Commerce Business Daily on the potential impact of an obligation in which a foreign entity will participate in a space mission as a supplier of the spacecraft

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[57] It is strongly preferred that there be only two parties to an agreement. While multiple parties to an agreement are possible, such agreements are complex and require very precise drafting to ensure clear delineation of responsibilities.

[58] Use of MOUs for agreements of significance is a matter of NASA policy and practice. The Office of External Relations consults with the State Department Bureau of Oceans and International Environmental and Scientific Affairs, on an expedited basis, to determine if Circular 175 authority is required for NASA agreements under international law with foreign government agencies and international organizations.

[59] If the SAA is governed by U.S. law, then Case-Zablocki Act requirements do not apply.

[60] The Case-Zablocki Act requires that the State Department report significant international commitments of the U.S. to the foreign relations committees of the U.S. Senate and House of Representatives. NASA (OER lead) is required to transmit to the Department of State the text of each agreement and supporting documentation no later than 20 days after the agreement has been signed so that the Department of State may transmit each agreement to Congress no later than 60 days after its entry into force. Compliance with these procedural requirements is especially important as Congress has amended the Case-Zablocki Act, as part of the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108-458), to preclude the use of appropriated funds (for Fiscal Years 2005, 2006 and 2007) to implement agreements that are not transmitted to Congress on time. The prohibition on using appropriated funds remains in place until an agreement is transmitted to Congress in accordance with the Case-Zablocki Act (1 U.S.C. § 112(b) note).

[61] When this is the case, it is important that NASA follow up with the Department of State to ensure that this additional procedural step occurs. Otherwise, the agreement, while appearing to be in force, technically may not be.

or a related system, prior to entering into such an obligation.[62] Please consult with OER about the applicability of this provision to a particular draft agreement.

One type of international SAA of particular note is the so-called "barter" agreement. While all international cooperation involves no exchange of funds and in that sense represents a barter arrangement, in NASA international agreement practice the term "barter" refers to a limited category of collateral transactions involving in-kind payment for services among international partners in the International Space Station (ISS) program and specifically authorized by the ISS international agreements. Otherwise, acquisition by NASA of in-kind goods and services is accomplished through barter contracts under the Federal Acquisition Regulation. Depending upon the significance of the barter, Circular 175 authority may be required.

4.3. INTERNATIONAL NONREIMBURSABLE AGREEMENT - LETTER AGREEMENT

NASA international cooperative activities of lesser significance can be addressed by using a Space Act letter agreement. NASA may initiate the process by forwarding a letter to a foreign governmental entity or international organization proposing the terms of the cooperation. Receipt of a letter from the foreign party indicating unconditional acceptance of the agreement with the proposed conditions concludes the process.[63] The "agreement" is not effective until an affirmative response is received; the letters together then constitute the letter agreement, which is intended to bind both parties under international law. U.S. law can also be used in Letter Agreements.[64]

4.4. INTERNATIONAL REIMBURSABLE AGREEMENT

NASA enters into International Reimbursable SAAs to facilitate use by foreign entities of NASA facilities, goods, and services. Examples of the circumstances in which NASA facilities, goods, and services may be supplied to a foreign party under an International Reimbursable SAA include:

- NASA may accept reimbursement for use of NASA facilities, for unique services that are developed in-house, or for items not generally available on the commercial market from any source (*e.g.*, specially tested integrated circuits uniquely designed for interplanetary spacecraft). However, NASA should not act

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[62] 42 U.S.C. §2475(a)(1) provides:
As part of the evaluation of the costs and benefits of entering into an obligation to conduct a space mission in which a foreign entity will participate as a supplier of the spacecraft, spacecraft system, or launch system, the Administrator shall solicit comment on the potential impact of such participation through notice published in Commerce Business Daily at least 45 days before entering into such an obligation.

[63] Proposal and acceptance may be reflected in a single document.

[64] Similarly, U.S. law can be used in MOUs. In either situation, if U.S. law governs, the agreement is not an agreement requiring coordination with State through the Circular 175 procedure.

as a purchasing agent or broker for party acquisition of widely available goods, parts, or services.

- Reimbursable work also may be undertaken to support a foreign entity, unrelated to any larger cooperation, on similar terms and conditions as would be provided to a domestic party. The proposed activity must be consistent with NASA's mission, and NASA cannot, by virtue of the support provided, compete with the private sector. NASA may only allow non-Federal entities to use its space-related facilities on a reimbursable basis if the NASA Administrator (or designee) determines that "equivalent commercial services are not available on reasonable terms." (15 U.S.C § 5807). Lastly, all the costs of the activity must be borne by the foreign party with advance payment to NASA and specific instructions should be included on the method of payment.

- When reimbursable NASA activity is relatively low cost and a minor component of an overall cooperation, it may be appropriate to negotiate arrangements for reimbursable work within the context of the broader cooperative effort. While the overall International SAA would be governed by international law, the reimbursable component of the work would be subject to a separate agreement, concluded under U.S. law. There are several reasons for utilizing this approach, including the fact that different intellectual property, liability, and financial provisions will apply to the reimbursable work. Consequently, the foreign party would be subject to standard SAA requirements to which all U.S. parties are subject, such as the use of services or facilities on a non-interference basis.

In general, International Agreements that are Reimbursable Agreements with foreign entities should be concluded consistent with the guidance and sample clauses for agreements with nongovernmental entities in Chapter 2. Typically, these agreements are concluded pursuant to U.S. law. This is in part because enforceability of payment terms and conditions or settlement of agreement interpretation issues under international law could be more problematic than under U.S. Federal law. Where NASA is performing reimbursable work for a foreign entity, guidance in NPD 1370.1 must be followed. Among other requirements, NPD1370.1 provides that reimbursable work for a foreign entity must provide a benefit to NASA or the public. In SAAs for: (1) safety-related analysis and testing in NASA facilities, or (2) fundamental research related to NASA's mission,[65] benefits to NASA or the public are normally provided through shared data rights or broad dissemination of the results.[66] For any reimbursable work mentioned above, Data Rights sample clause 2.2.10.1.3 must be used unless other data rights provisions are approved by OER, on a case-by-case basis.

[65] "Fundamental research" means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community. Fundamental research is distinct from proprietary research and from industrial development, design, production and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons (NDP 1370.1(1)(d)(4).

[66] NPD1370.1.

Other reimbursable SAAs with foreign entities that do not involve fundamental research or safety-related analysis and testing in NASA facilities may incorporate the traditional data rights clauses utilized

in other reimbursable SAAs, clauses 2.2.10.1.1 and 2.2.10.1.2 in accordance with the guidance provided for those clauses.

Note also that International Reimbursable Agreements typically do not provide for NASA to be reimbursed for supplying goods or services needed by an SAA party in connection with an international cooperative effort, unless the relevant International SAA provides that NASA will furnish goods or perform work for the foreign party.

Conversely, NASA may have to purchase goods or services from the foreign party in order to meet NASA's responsibilities under an agreement. The proper instrument for making those purchases is via a Federal Acquisition Regulation (FAR) contract; a funded SAA should not be used for these transactions. An SAA with a foreign entity authorizes cooperative work between or among NASA and foreign parties involving contributions of goods and services for a mutual goal, or reimbursable work consistent with NASA's mission. If the foreign entity requires stated payment in the form of monetary compensation, NASA must enter into a contract with the foreign entity. In exceptional cases, barter compensation may be included in a contract.

Prior to entering such an arrangement, certain conditions must be satisfied before NASA funds can be provided to a foreign government or governmental entity for the purpose of performing or procuring services to fulfill NASA's obligations. Specifically, the proposed FAR contract must be an express condition of the foreign party's participation in the project and the party's participation must be a necessary and critical component without which the project could not proceed. This condition must be an explicit provision of the international cooperative SAA for the FAR contract to be issued. Contact the Office of the General Counsel for assistance.

All Reimbursable Agreements are subject to the NASA Chief Financial Officer/Comptroller's regulations and guidance for determining, allocating, and billing costs. These regulations are contained in NASA Financial Management Requirements (FMR) Vol. 16, Reimbursable Agreements, and, among other things, require the establishment of a Headquarters Deposit Account and payment in advance for the goods or services provided by NASA.

4.5. INTERNATIONAL AGREEMENT CONTENTS

International SAAs do not legally require a specific format, provided that each contains a written formulation that clearly delineates the purpose and scope of an activity and is consistent with applicable law and NASA policies. NASA utilizes two basic agreement formats: MOUs for activities significant in scope and involving substantial resource commitments, and letter agreements authorizing more limited cooperative activities. Moreover, foreign SAA parties sometimes have unique requirements or preferences

relating to agreement formats. Nonetheless, NASA has concluded hundreds of international MOUs and letter agreements that include the following sections, in the order presented.[67] Additional sections may be added, as appropriate, for specific situations.

1. Title.
2. Authority.
3. Background/Preamble.
4. Purpose/Description of Cooperation.
5. Responsibilities.
6. Financial Arrangements.
7. Scheduling Conflicts.
8. Management Points of Contact.
9. Liability and Risk of Loss.
10. Registration of Space Objects
11. Transfer of Goods and Technical Data.
12. Intellectual Property.
13. Rights in Resulting Data.
14. Release of Results and Public Information
15. Customs/Taxes/Immigration.
16. Ownership of Equipment.
17. Dispute Resolution.
18. Mishap Investigation.
19. Modifications/Amendments.
20. Choice of Law.
21. Entry into Force, Term, and Termination
22. Continuing Obligations.
23. Anti-Deficiency Act.
24. Authority to Conclude.
25. Provisional Application and Entry into Force.
26. Signatory Authority

4.5.1. TITLE

International SAAs are given short titles, which state: (1) the type of agreement, (2) the parties, and (3) the agreement's purpose.

4.5.1. Title (Sample Clause)

4.5.2. AUTHORITY

This section recites the legal authority for NASA to enter into International SAAs and, when appropriate or necessary, the source of the SAA partner's authority.

4.5.2. Authority (Sample Clause)

[67] Note that formal headings are more typically utilized for MOUs. The provisions of letter agreements are often formatted as paragraphs within the text of a letter.

4.5.3. BACKGROUND/PREAMBLE

MOUs and letter agreements typically contain prefatory language describing the general nature and purpose of the cooperative project. This section: (1) explains how the proposal for the cooperative project came about (*e.g.*, response to an Announcement of Opportunity (AO), technical discussions, or political invitation); (2) recalls previous, related collaborations; (3) delineates any relationships with other international mandates, groups, or projects; and (4) references any applicable international agreements, including, in some cases, relevant treaties (*e.g.*, related to outer space or protection of the environment).[68]

Additionally, parties sometimes include descriptions of their relevant national policies or mandates. In MOUs, this information is usually contained in a formally styled section known as a "preamble," which can be lengthy in some instances. Abbreviated phrases that are used throughout the SAA (*e.g.*, the "Parties") are also defined in this section.

4.5.3. MOU Preamble (Sample Clause)

4.5.4. PURPOSE/DESCRIPTION OF COOPERATION

This section briefly describes the cooperative project, including the purpose and general scope of the activities planned, and outlines the agreed-upon scientific and technical objectives of the overall mission. This section should also clearly describe or identify the basis for the mutual interest of both parties in the project.

There is no "standard" format for this section. The drafter may choose a format based on the nature and scope of the project or similar SAAs. In MOUs this language may be addressed in one or more paragraphs at the beginning of the SAA; the larger the magnitude of the project, the more lengthy the section will be. In letter agreements, program descriptions usually consist of one or two introductory paragraphs.

4.5.4. Purpose/Description of Cooperation (Sample Clause)

4.5.5. RESPONSIBILITIES

This section precisely delineates the actions to be performed by each party in order to conduct the cooperative project, along with the benefits or rights accruing to each side. Enumerated responsibilities depend upon the nature of the project and may include items such as management roles; data exchange; provision of hardware; integration/testing of

[68] Note that, while numerous agreements and prior cooperative activities between the parties can be included in the Preamble, specific agreements that legally govern the cooperation should not be. For example, if an implementing arrangement is concluded pursuant to, or in accordance with, a governing Framework Agreement, the controlling agreement is cited in the Authority section of the Agreement, since preambles are generally considered nonbinding. Thus, Article (or Section) 2 of the text would likely begin with: "This Implementing Arrangement in concluded pursuant to the [Name of Framework Agreement], which entered into force on [date]."

equipment or spacecraft; launch, tracking and data acquisition; data processing, archiving and distribution; reporting requirements; participation in working groups and meetings; mission operations, supporting ground observations, and post-mission data analysis. The commitments of each party should be based on the use of "reasonable efforts."

The division of responsibilities should be clearly defined and distinct for managerial and technical areas, to minimize complexity of the project and enable the transfer of technology. Generally, there should be no joint development of equipment required to conduct the project because each party should agree to develop and deliver its own equipment according to a stated set of requirements.

Several different formats may be used for describing rights and responsibilities in NASA's International SAAs, depending on the nature and scope of the cooperative activity, the identity of the SAA partner, and previous SAAs with that partner for similar types of projects. The paragraphs or sections can be organized according to party (the most common format for letter agreements), functional category (*e.g.*, design and development, mission operations, and data distribution), mission phase, or a combination of these. For large cooperative activities, management relationships and responsibilities are sometimes described in separate paragraphs.

In an International SAA, each party's obligations may be described in general terms. The parties then develop lower-level implementation plans that more specifically identify each party's responsibilities. These plans provide sufficient detail to describe the core obligations, the nature of the resources required to meet those obligations, and the resulting rights belonging to each party. If this approach is followed, the SAA should specify approval and amendment authority for each lower-level plan (*e.g.*, a jointly chaired control board or individuals designated by title). An "order of preference" provision should also be included stating that the SAA (higher-level or umbrella agreement) is to govern in the event of conflict between the MOU or letter agreement and the lower-level implementation plans.

These implementation plans (and other joint documents) that provide technical content for the higher level (framework or "umbrella") International SAA generally are not required to be provided to the State Department for Circular 175 review. However, if the higher level SAA is general in nature and the implementing plan meets the other Circular 175 requirements (*e.g.*, significant activity), then the implementing plan may need to go through the Circular 175 process. For example, the implementing arrangements between NASA and the Russian Space Agency for a joint Mars mission and for human space flight cooperation, each executed under an international framework agreement between the U.S. and Russia to cooperate in the exploration and use of outer space for peaceful purposes, did require State Department C-175 review. Implementing arrangements under the International Space Station MOUs also require such review.

4.5.5. Responsibilities (Sample Clause)

4.5.6. FINANCIAL ARRANGEMENTS

Where NASA and a foreign party are engaged in a cooperative effort, each party commits to funding its own effort, subject to its respective funding procedures. Therefore, these SAAs contain a clause specifying that there be no exchange of funds, thus, committing each party to seek adequate funding, and requiring notification and consultation in the event funding problems are encountered. The sample clause can be used in MOUs and letter agreements.

4.5.6. Financial Arrangements (Nonreimbursable Agreement Sample Clause)

4.5.7. SCHEDULING CONFLICTS

This section ensures that, in the event other NASA priorities arise, NASA is not obligated under an International SAA to perform the activities according to any schedule stated in the SAA. It provides that in the event of a conflict in scheduling the NASA resources, NASA, at its sole discretion, may determine which usage takes priority. However, the SAA may reflect current planned milestones or express the desire of the SAA partner that activities occur at a specified time.

4.5.7. Scheduling Conflicts (Sample Clause)

4.5.8. MANAGEMENT POINTS OF CONTACT (POCs)

To establish clear management interfaces, program-level and, in some cases, project-level POCs should be specified as dictated by the cooperative activity and the management framework of both parties. For example, in larger projects, there may be program and project managers, and program and project scientists, each having distinct management and scientific roles under the SAA. POCs also are important because they serve as official communications channels regarding activity to be performed by the respective parties. It is also recommended that the POCs be identified by title rather than by name to avoid the need to amend SAAs when changes in personnel occur. For NASA, the program POC should be a NASA employee, either from Headquarters or a Center, as appropriate. At the project-level, POCs are usually from a Center or the Jet Propulsion Laboratory. For large endeavors, separate management paragraphs may be required to describe the management interfaces, joint management mechanisms, control and decision authority processes, and review procedures. It is also important to name POCs because they are often utilized in dispute resolution procedures (Section 4.5.17).

4.5.8. Management Interfaces/ Points of Contact (Sample Clause)

4.5.9. LIABILITY

4.5.9.1. LIABILITY AND RISK OF LOSS

Considerations affecting decisions about the degree of risk NASA should accept for activities under an International SAA are generally the same as those involving activities with domestic nongovernmental entities. It involves assessing the degree of NASA's interest as well as any foreseeable risk inherent in the activity. For a detailed discussion of the factors to consider, see "Domestic Agreements," at section 2.2.9. In International SAAs covering high-risk Expendable Launch Vehicle (ELV) or Reusable Launch Vehicle (RLV) missions or activities in connection with the ISS program, cross-waivers apply only if both entities are involved in "protected space operations." Agreements covering such activities require specific cross-waiver provisions set forth at 14 CFR Part 1266. It is important to note that if a party is the Government of Japan or a related organization (*e.g.*, the Japanese space agency, Japanese Aerospace Exploration Agency (JAXA)) and the SAA covers a mission related to the International Space Station, then additional language is required to capture the unique requirements of the Government of Japan with respect to subrogated claims. Similarly, if a party is the Government of Japan or a related organization and the SAA covers a mission related to ELVs or RLVs, a special provision must be used. In either case, please consult with OER and OGC.

4.5.9.1.1. Liability and Risk of Loss – Cross-Waiver (Cross-Waiver with Flow Down Provision Sample Clause)

4.5.9.1.2. Liability and Risk of Loss – Cross-Waiver (Cross-Waiver of Liability for Agreements Involving Activities Related to the ISS Sample Clause)

4.5.9.1.3. Liability and Risk of Loss – Cross-Waiver (Cross-Waiver of Liability for Launch Agreements for Science or Space Exploration Activities Unrelated to the International Space Station Sample Clause)

4.5.9.1.4. Liability and Risk of Loss – Third Party Claims Consultation (Sample Clause)

4.5.9.2. LIABILITY CONVENTION

International SAAs involving space flight must address obligations under the Convention on International Liability for Damage Caused by Space Objects (Liability Convention) (24 U.S.T. 2389, T.I.A.S. 7762). The Liability Convention establishes rules and procedures addressing the liability of countries for damage caused to other nations by their space objects. Under the treaty, a launching state (which includes a nation whose territory or facilities are used to launch a space object and a nation which launches or procures a launch) is strictly liable for damage caused by its space object on the surface of the Earth or to aircraft in flight. Therefore, parties to the treaty have accepted absolute

liability for such damage, without requiring that fault be established. For damage in outer space, a launching state is liable only if the damage is due to its own fault.

In NASA's International SAAs involving space flight, the prescribed cross-waiver clause notes that agreeing to waive claims between the parties includes a waiver of any potential claims arising under the Liability Convention. To address possible claims by third-party countries, a clause requiring consultation between the cooperating parties should be included.

4.5.9.2. Liability Convention (Sample Clause)

4.5.10. REGISTRATION OF SPACE OBJECTS

The Convention on the Registration of Objects Launched into Outer Space (Registration Convention) (28 U.S.T. 695, T.I.A.S. 8480) provides for national registration by launching states of space objects and mandates a central registry be maintained by the United Nations. The implications of registering a space object include assuming responsibility, jurisdiction, and control over that space object, pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty) (18 U.S.T. 2410, T.I.A.S. 6347).

Under the Registration Convention, when there are two or more launching states, they are to determine jointly which one of them will register the object. Therefore, SAAs involving flight into outer space should identify the registering State. Factors to consider in making this determination include which party is to provide the launch, or contribute the spacecraft, whether a spacecraft is to remain in orbit, and who is to conduct the majority of the day-to-day operations of the spacecraft. If the SAA partner is not a governmental entity, the SAA should state that the partner will request that its government register the object.

4.5.10. Registration of Space Objects (Sample Clause)

4.5.11. TRANSFER OF GOODS AND TECHNICAL DATA

This clause addresses the transfer of hardware and its associated technical data (*e.g.*, data directly related to the interfaces, integration, testing, use, or operation of an item of hardware) required for the parties to meet their obligations under the SAA. Also, to the extent applicable, the provision is intended to cover the rights and obligations of the parties with respect to transferred proprietary technical data and export-controlled data and goods.

A significant percentage of NASA's international activities may involve transfers by NASA, or other U.S. parties, of commodities, software, or technologies to foreign parties. These transfers are generally subject to export control laws and regulations, regardless of whether they occur in the United States, overseas, or in space. Export controls are

imposed on such transfers and activities in order to protect the national security and to further U.S. foreign policy objectives. NASA's Export Control Policy was articulated by the Administrator in October 1995:

> As a U.S. Government Agency on the forefront of technological development and international cooperation in the fields of space, aeronautics, and science, the National Aeronautics and Space Administration will strive to fulfill its mission for cooperative international research and civil space development in harmony with the export control laws and regulations of the United States and the world, including risks posed by the spread of missile technologies and weapons of mass destruction, and in view of the significant criminal, civil, and administrative penalties that may affect the Agency and its employees as a result of a failure to comply with U.S. export control laws and regulations, it is the responsibility of every NASA official and employee to ensure that the export control policies of the United States, including nonproliferation objectives, are fully observed in the pursuit of NASA's international mission.

Overall, each party is obligated to transfer to the other party only those technical data and goods necessary to fulfill the transferring party's responsibilities under the SAA. When appropriate, the type of data to be exchanged without restrictions is specified, *e.g.*, "interface, integration, and safety data (excluding detailed design, manufacturing, and processing data, and associated software)." Sample clause 4.5.11 is structured to allow the parties to exchange data without restrictions, except for possible proprietary or export-controlled data. Additionally, the clause precludes the unwarranted transfer of technology by limiting use of all marked proprietary technical data, marked export-controlled data, and goods transferred under the SAA to the specific purposes of the programs implemented by the SAA. (*See* NASA's Export Control Program, NPD 2190.1 and NPR 2190.1).

4.5.11. Transfer of Goods and Technical Data (Sample Clause)

In certain cases, transfers of particularly sensitive items, including technologies, warrant more restrictive provisions regarding transfers of technical data and goods between parties. Such cases may include launch activities, transfers of advanced payloads or other items with heightened export control concerns, or activities which raise special security, foreign policy, or nonproliferation issues. In these cases, it is appropriate to provide the parties with the ability to review proposed retransfers of items among the receiving party's related entities (contractors, subcontractors, etc.), if desired.

4.5.12. INTELLECTUAL PROPERTY

International SAAs should address the allocation of rights in any intellectual property that may arise under the proposed activity. In general, NASA's cooperative activities with foreign entities are not directed to the joint development of technology, products, or

processes that are potentially of commercial value. Each party is fully responsible, technically and financially, for a clearly defined element of the project. When NASA has a cooperative agreement with a foreign party, Sample Clause 4.5.12 (Intellectual Property) should be used. The clauses allow each party to retain intellectual property rights in the technology/hardware it has developed independently of the other party. Scientific results of NASA's cooperation with foreign entities, however, are shared among the cooperating parties and made available to the international community.

The intellectual property sample clause 4.5.12 should be included in all nonreimbursable SAAs with foreign entities. Sample clause 4.5.12 reflects NASA's basic approach that has evolved over the years for commonly encountered circumstances. In addition to NASA and the foreign entity, the sample clause affects any "related entity" of an SAA party (defined as contractors, subcontractors, grantees, or cooperating entities, or any lower tier contractor, subcontractor, grantee, or cooperating entities of a Party). Sample clause 4.5.12 includes five paragraphs that address allocation of rights in patents and copyrights as described below.

Paragraph 1 recognizes that each party retains full rights and interest in its own "background" inventions and works, including any patents and copyrights, respectively, therein, *i.e.*, inventions and works created prior to, or independently of, the activities carried out under the SAA. Paragraph 2 recognizes that inventions or works made under the SAA exclusively by one party or its related entity belong to that party or related entity and also addresses allocation of rights between a party and its related entity. Paragraph 3 provides that, in the event an invention is made jointly (by both parties) the parties shall agree to consult on allocating rights, steps to be taken to establish patent protection, and licensing matters. Paragraph 4 provides that, in the event of a jointly authored work, the parties shall agree to consult on maintaining copyright protection throughout the world. Lastly, paragraph 5 recognizes the existence of a royalty-free right for each party to use any copyrighted work created under the Agreement regardless of which party is the author.

4.5.12. Intellectual Property Rights (Sample Clause)

4.5.13. RIGHTS IN RESULTING DATA

This clause addresses the parties' exchange of and right to use the data (usually of a scientific nature) resulting from the activities under the SAA, as well as the availability of data to others. In appropriate circumstances, the parties may agree that the raw scientific data derived from experiments will be reserved to PIs for scientific analysis purposes and first publication rights for a set period of time, usually not exceeding 1 year. The period begins with receipt of the raw data and any associated (*e.g.*, spacecraft) data in a form suitable for analysis. In appropriate instances, PIs may be requested to share the data with other investigators, including interdisciplinary scientific and guest investigators, to enhance the scientific return from the mission/program under procedures decided by a designated group under the SAA. Such "reserved use" periods are not usually provided in Earth science data arrangements or in other arrangements where rapid, open, and unrestricted data access is desired.

It is also usually agreed that the parties to the SAA will have access to, and use of, the raw data and any associated data, but, during the exclusive-use period, such parties' use will not prejudice the first publication rights of the PIs. The parties customarily agree that, following the exclusive-use period, the data will be deposited with designated data repositories or data libraries, as appropriate, and, thereafter, will be made available to the scientific community for further scientific use.

For framework agreements, this clause is broadly drafted (as in Sample Clause 4.5.13) , with the specifics of data sharing left to later provisions on data sharing between the parties in mission-specific documents. For mission specific agreements, this clause is typically drafted to meet the requirements of a specific mission. Drafters need to make sure the provision is consistent with the Release of Results and Public Information clause.

4.5.13. Rights in Resulting Data (Sample Clause)

4.5.14. RELEASE OF RESULTS AND PUBLIC INFORMATION

Clause 1 ensures that each party controls the release of public information regarding its own activities and requires advance coordination with the other party regarding release of information concerning the other party's activities.

Clause 2 promotes release of public information to the scientific community resulting from activities under the Agreement.

Clause 3 recognizes that certain categories of data or information are not to be disclosed without written concurrence of the other party, namely: export controlled, classified, or proprietary information; or information relating to a potential patent application.

Clause 4 will be used only in SAAs with the European Space Agency, when appropriate.

4.5.14. Release of Results and Public Information (Sample Clause)

4.5.15. CUSTOMS/TAXES/IMMIGRATION

Where the SAA requires importation of goods into the United States or the territory of the SAA partner, NASA's International SAAs should contain a general obligation to facilitate free customs clearance (*e.g.*, waiver of applicable duties or taxes) for admittance to, and departure from, each party's respective country for material required for the implementation of the cooperative project. "Duty-Free Entry of Space Articles," (14 C.F.R. Part 1217) describes the procedures for duty-free import of articles under NASA's international programs. If the SAA partner cannot waive these costs, NASA requires that the partner pay any such costs.

4.5.15.1 Duty Free Entry (Sample Clause)

When the agreement contemplates travel of personnel between the locations of the two parties, the SAA should contain an obligation for each party to facilitate movement of persons and goods necessary to implement the SAA into and out of its territory (*e.g.*, ISS, where large numbers of personnel and equipment are moving among the party States).

4.5.15.2. Facilitate Movement of Persons and Goods (Sample Clause)

Finally, the SAA may need to contain an obligation to facilitate provision of the appropriate entry and residence documentation for the SAA partner's nationals and families of nationals who enter, exit, or reside within its territory in order to carry out the activities under the SAA (*e.g.*, an SAA for an extensive cooperative project with a country that has complicated and lengthy immigration procedures, such as Russia).

4.5.15.3. Facilitate Entry and Resident Documentation (Sample Clause)

4.5.16. OWNERSHIP OF EQUIPMENT

An SAA involving temporary transfer of equipment to another country should contain language addressing ownership. It is recommended that the provision state that each party retains ownership of the equipment each provides to the other and the parties agree to return any of the other party's equipment in its possession at the conclusion of the project. Depending on the nature of the activity, other aspects of ownership, such as any restrictions on transfer or on exercise of certain ownership rights, may need to be addressed.

4.5.16. Ownership of Equipment (Sample Clause)

4.5.17. DISPUTE RESOLUTION

All SAAs should include a dispute resolution clause. The SAA should outline the specific procedures to be followed. SAAs should first include language stating that both parties agree to consult promptly with each other on all issues involving interpretation,

implementation, or performance of the SAA. Generally, issues are handled at the working level before being elevated to a higher level if the parties cannot achieve resolution. Any matter that cannot be settled at this initial level is referred to the next higher level official for both parties. Depending on the complexity and sensitivity of the agreement, the dispute may be referred for resolution to the next higher level of officials of both parties. That official may be the official who signed the agreement.

If these officials are unable to resolve a dispute under an agreement governed by U.S. law, the NASA official at the working level, or one level higher (depending on the complexity and visibility of the SAA activity) should provide to the SAA partner, in writing, a final Agency decision. This final Agency decision becomes part of the administrative record of the dispute.

Note: With rare exception, the NASA Administrator should not be involved in dispute resolution activities. Use of the Administrator as the designated official for making a final Agency decision requires consultation with the Offices of the Administrator and the General Counsel. Referring a dispute to "the NASA Administrator or his designee" is acceptable.

In very limited instances NASA may agree to a provision that permits possible settlement of disputes through an agreed form of resolution, such as non-binding arbitration or mediation. However, the provision must provide that, at the time of the dispute, both parties, must agree to submission of the specific matter in dispute. Agreement to any such clause is highly unusual and requires specific approval by the General Counsel.

4.5.17. Consultation and Dispute Resolution (Sample Clause)

4.5.18. MISHAP INVESTIGATION

For international activities where there is the possibility of a serious accident or mission failure occurring, and the parties involve non-U.S. Government personnel, it is advisable to include a mishap investigation clause in the agreement. If applicable, NPR 8621.1B, "NASA Procedural Requirements for Mishap Reporting, Investigating and Recordkeeping" should be followed for investigating a NASA mishap.

4.5.18. Mishap Investigation (Sample Clause)

4.5.19. MODIFICATIONS/AMENDMENTS

An International SAA usually provides that it may be amended, in writing, at any time by mutual agreement of the parties. However, depending on the terms of the agreement and the original Circular 175 authorization, amendments to an MOU may require State Department Circular 175 review prior to incorporation.

4.5.19. Modifications/Amendments (Sample Clause)

4.5.20. CHOICE OF LAW

In the absence of specific language, international law applies to international MOUs and letter agreements as a matter of general international law. This would also be the case when the agreement is being concluded under cover of diplomatic notes that make the agreement binding at the government level. Therefore, no "choice of law" clause is required.

NASA will not agree to being governed by foreign law, but is willing to apply U.S. Federal law when the SAA partner lacks capacity to sign agreements governed by international law. This policy is grounded in the recognition that, while foreign government agencies are often reluctant to conclude international cooperative agreements under U.S. law, it would be inequitable for the foreign agency's lack of legal capacity to conclude international agreements to result in the application of foreign law.

Regardless of the choice of law, however, NASA's performance of its responsibilities under any SAA is subject to applicable U.S. laws.

The sample clause should be used for agreements with governmental entities that do not have authority to enter into international agreements.

4.5.20. Choice of Law (Sample Clause)

4.5.21. ENTRY INTO FORCE, TERM AND TERMINATION

This section sets forth the duration of the SAA, specifying beginning and ending dates. Usually the effective date, the date the agreement enters into force, is the date of last signature, but in all cases the effective date may not occur before both parties have executed the SAA. Thus, an MOU generally becomes effective on the date of the last signature. In certain instances, MOUs may only become effective upon an exchange of diplomatic notes between the U.S. and the government of the cooperating agency confirming acceptance of its terms and confirming that all necessary legal requirements for entry into force have been fulfilled. (*See* section 4.2 above.) For letter agreements, determining the effective date can be more problematic. Careful reading of the exchange of letters must confirm that there has been unconditional acceptance of the terms. The date of unconditional acceptance will determine the effective date of the SAA.

International SAAs should always specify duration for the cooperative project. The duration could be measured by a specific period of time (*e.g.*, 3 years), or a project milestone (*e.g.*, when the satellite ceases operations), or a combination of both (*e.g.*, for 3 years, or until cooperative activities are complete, whichever is earlier). The SAA should also state that the duration may be extended by written agreement of the parties. Use of automatic renewals is inconsistent with NASA practice and requires approval by the Office of External Relations. Also, it is not NASA's practice to renew agreements after

they have expired. Therefore, action to extend an agreement must be taken prior to the expiration date, even in cases where the terms of the agreement remain unchanged. *Note*: For MOUs and letter agreements that need Circular 175 authority, such an extension may require Circular 175 review and approval.

Either party to one of NASA's International SAAs should be allowed to terminate the SAA upon written notice to the other. This notice is generally required to be presented to the other party in advance of the desired termination date, usually 3 to 6 months. For significant cooperative activities, particularly ones involving provision of critical elements or subsystems, a termination agreement may be required. Because international law does not provide specific requirements for cost allocation that may govern agreements and contracts under U.S. law, cost responsibilities may be addressed in a termination agreement. More typically, however, a termination agreement is for the purpose of dispositioning elements or subsystems already provided under the agreement and, where appropriate, enabling a party to obtain title to or use of goods or intellectual property to enable it to proceed with the activity.

Where, on the other hand, the cooperative activity does not include provision of critical elements or subsystems and, thus, no termination agreement is appropriate, it is quite common to include a sentence that encourages each party to take the interests of the other into account upon termination and specifically to minimize potential negative impacts to the other. For example: "In the event of termination, the terminating party will endeavor to minimize negative impacts of such termination on the other."

4.5.21. Entry into Force and Term of Agreement (Sample Clause)

4.5.22. CONTINUING OBLIGATIONS

International SAAs should specify which obligations of the parties (*e.g.* intellectual property rights, transfer of goods and technical data, and liability) survive termination or expiration of the SAA. The specific sections should be referenced.

4.5.22. Continuing Obligations (Sample Clause)

4.5.23. ANTI-DEFICIENCY ACT

All SAAs must include an Anti-Deficiency Act provision that states that promises made by NASA to the SAA partner are subject to the availability of appropriated funds by the U.S. Congress.

4.5.23. Anti-Deficiency Act (Sample Clause)

4.5.24. AUTHORITY TO CONCLUDE

This clause allows NASA to confirm that the SAA partner has the appropriate signing (and other legal) authority to commit the SAA partner to fulfill the obligations of the Agreement.

4.5.24. Authority to Conclude (Sample Clause)

4.5.25. PROVISIONAL APPLICATION AND ENTRY INTO FORCE

When the SAA partner's legal system requires that an agreement be subject to some ratification process, such as Parliamentary or Cabinet approval, we often use "provisional application" so that the parties can begin cooperating together (and relying on the Agreement text) before the Agreement technically goes into force.

4.5.25. Provisional Application (Sample Clause)

4.5.26. SIGNATORY AUTHORITY

This section should include a signature block, as well as the typed title and date of signature for each signing official. During negotiations, care should be taken to identify and confirm that the signing officials (usually senior officials) have authority to bind the parties.[69] The signing official should be referred to by his/her title – not by individual name (*e.g.*, NASA Administrator, not "Michael Griffin").

4.5.26. Signatory Authority (Sample Clause)

4.6. INTERNATIONAL AGREEMENTS FOR SPECIAL ACTIVITIES

These agreements can be MOUs, MOAs, or other types of nonreimbursable or reimbursable SAAs depending on whether NASA is being compensated for its effort.

4.6.1. STANDARDS OF CONDUCT/FOREIGN CREWMEMBER

Certain provisions related to standards of conduct must be contained in SAAs with foreign partners that provide for training or flight of a foreign Space Shuttle or ISS crewmember. Specifically, the SAA must require the crewmember to enter into a standards of conduct agreement with NASA at, or prior to, the beginning of the training period, which will include installation safety and security matters, provisions related to prohibition on use of position for private gain, authority of the Mission Commander, and limitations on use of information received during training and flight. The foreign partners must ensure that its crewmembers comply with the provisions of such an agreement. In some cases, it may be appropriate to include a standard of conduct annex as an attachment to the International SAA.

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[69] *See* Section 4.5.24 above.

4.6.2. FOREIGN INVESTIGATOR AGREEMENT

Sometimes, foreign investigators, science team members, or interdisciplinary scientists are selected for NASA missions after responding to a NASA scientific Announcement of Opportunity (AO) or NASA Research Announcement (NRA). Under current policy, NASA does not fund the work of foreign investigators selected through these competitive processes. Therefore, once selected, International SAAs must be executed with a governmental entity, within the selected scientist's country, willing to sponsor the scientist's participation in the cooperative project. The sponsoring agency agrees to ensure fulfillment of the specified responsibilities by its scientist(s), in accordance with the terms of the agreement.

As a general rule, for a foreign Principal Investigator, NASA generally executes a single agreement with the scientist's sponsoring agency, in which the sponsoring agency must ensure that the PI and all the non-U.S. Co-Investigators (Co-Is) abide by the terms of the agreement. In this case, NASA looks to the sponsoring agency of the foreign PI to establish the appropriate legal relationships with the non-U.S. Co-Is on the team. Exception: If no governmental sponsor can be identified, NASA can execute an SAA directly with the foreign PI's institution. The SAA would then be governed by U.S. law.

The liability clause to be used in a foreign investigator agreement depends on several factors. If the investigator is involved with hardware development or mission operations for a payload to be flown on the Space Shuttle, the ISS, or a NASA-sponsored ELV or RLV mission, the applicable cross-waiver with the full "flow down" clause should be used. If the investigator is only performing data analysis on the resultant data, the more limited cross-waiver clause is appropriate. See Section 4.5.9.1.

4.6.3. LOAN OF EQUIPMENT AGREEMENT

A broad cooperative effort may provide an incentive for NASA to lend equipment to a foreign partner under a separate international letter agreement.[70] Such a loan agreement should identify the cooperative area of interest, include a list of the items to be provided, specify duration of the loan, and impose certain obligations, unique to a loan agreement, on the receiving party. If no other SAA is in place covering the joint activity for which the equipment is being lended, the loan agreement should include the respective roles and responsibilities of each party regarding the scope of the contemplated joint project. It should also include responsibility to return the equipment in its original condition, absent normal wear and tear.

4.6.4. REIMBURSABLE TRAVEL AGREEMENT

Some International SAAs may provide for the SAA partner to reimburse NASA for travel and subsistence of NASA personnel that may be requested by the party to provide assistance during the joint project. See NPD 9710.1T, "Delegation of Authority – To

[70] Alternatively, provisions regarding the loan of equipment may be covered in the SAA covering the cooperative effort. *See* section 4.5.16.

Authorize or Approve Temporary Duty Travel on Official Business and Related Matters." Pursuant to NPD 9710.1T, paragraph 6, certain officials or their designees are authorized to enter into such reimbursable arrangements when it is determined to be in NASA's best interests. The actual reimbursement procedures to be followed are in FMM 9700, Chapter 301.

These reimbursements must be distinguished from gifts of travel and related expenses from foreign governments, as defined in 5 U.S.C. § 7342. Also, reimbursement of travel and related expenses for attendance at a meeting or similar function must be accepted and reported in accordance with 31 U.S.C. § 1353 and 41 C.F.R. Part 304. "Meeting or similar function" means a conference, seminar, speaking engagement, symposium, training course, or similar event sponsored or cosponsored by a non-Federal source that takes place away from the employee's official duty station.

If the party agrees to defray the travel and subsistence costs of NASA contractor personnel, then the agreement should make clear that such costs are to be reimbursed directly to the contractor. Similarly, pursuant to NPD 9710.1T, NASA may fund the travel expenses of foreign party personnel for specific official purposes outlined in the NPD. These agreements should be coordinated with Office of the General Counsel.

4.6.5. VISITING RESEARCHER AGREEMENTS

There are, generally, two types of Visiting Researcher Agreements: one for NASA personnel going abroad and one for foreign researchers coming to NASA. The Agreements generally provide the framework for hosting the visitor, including such provisions as liability, safety and security, badging, and resources to be provided (*e.g.*, office space, telephone, and internet access).

APPENDIX 4. SAMPLE CLAUSES – AGREEMENTS WITH FOREIGN ENTITIES

4.5. AGREEMENT CONTENTS

4.5.1. Title Sample Clause.

Memorandum of Understanding between the National Aeronautics and Space Administration of the United States of America and [name of partner] for [state brief purpose].

4.5.2. Authority Sample Clause.

The authority for NASA entering into this MOU is the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. § 2472 et seq.).

4.5.3. MOU Preamble Sample Clause.

[Note: The sample clause provided below is for illustrative purposes only. MOU Preambles generally contain recitations of relevant prior agreements between the U.S., NASA, and the government or agency of the other country. As such, they are highly specific to the particular activity with a particular country. The following example is from an earth science agreement between the U.S. – Russia]

Taking into consideration the agreement between the Government of the United States of America and the Government of the Russian Federation on Science and Technology Cooperation, signed December 16, 1993, including the terms and conditions of the intellectual property annex thereto, hereinafter the "Science and Technology agreement;"

Noting the Statement of the Government of the United States of America and the Government of the Russian Federation on General Principles for U.S.-Russian Exchange of Scientific and Technological Data and Information, signed June 23, 1994;

Noting the U.S.-Russia agreement Concerning Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes, signed June 17, 1992;

Taking into consideration agreements concerning Earth observation from space, and Russian participation in the flight segment of the National Aeronautics and Space Administration's Earth Observing System (EOS) with the launch of a U.S. Stratospheric Aerosol and Gas Experiment (SAGE) II aboard a Russian Meteor-3M Spacecraft;

Reaffirming the goals of the Committee on Earth Observation Satellites (CEOS) and the Satellite Data Exchange Principles in support of Global Change Research. In particular, noting the CEOS objective to encourage complementary and compatibility among space-borne Earth observations systems and the data received from them;

Acknowledging the mutual interest in supporting the international effort to develop and maintain a comprehensive, long-term global data set covering the areas of global change research and environmental monitoring;

Desiring to improve access to and utilization of these data by the international research community, with the specific goals of making all data available to users, making data access easy, fostering collaboration and integration of the Earth science community, and preserving the knowledge base of data and research results;

Convinced that enhanced exchange of Earth science and environmental observation information and data (satellite and in-situ) between the United States and Russia is essential in order to undertake a long-term cooperative effort to understand the Earth and its environment, and that this exchange requires interoperability among the Earth science and environmental observation data and information systems of the parties;

The National Aeronautics and Space Administration (NASA) of the United States of America and the Ministry of Science and Technology Policy of the Russian Federation have agreed as follows: [*"Purpose" article follows.*]

4.5.4. Purpose/Description of Cooperation Sample Clause.

[Note: The sample clause provided below is for illustrative purposes only. The following example is from a space science agreement between NASA and a Japanese research agency.]

The highest priority science investigations for the high-energy cosmic ray physics discipline include the exposure of magnet spectrometers to the space environment. In order to meet this priority, the Japanese have developed a thin solenoid magnet and a real-time particle detector system for Balloon-borne experiments with a Superconducting Magnet Spectrometer (BESS). During the U.S.-Japan BESS collaboration from 1993 to 1995, three flights were successfully conducted, yielding significant scientific results such as, the first definitive detection of the cosmic antiprotons and the first measurement of the antiproton flux at low energies.

The primary purpose of this MOU is to establish a cooperative U.S.-Japan program to fly BESS experiments using NASA's stratospheric research balloon launch, tracking, and recovery capability. This cooperative program will produce significant scientific results well in advance of the flight of magnet spectrometers in space. One of the primary scientific objectives of this cooperative program is to search for antinuclei and make precise measurements of antiprotons and other components of cosmic rays. The search for antimatter should shed light on the matter/antimatter asymmetry of the universe and might provide insight into the nature of dark matter. A second major scientific objective of the BESS program is to measure the spectra of protons and helium and their isotopes through the half solar cycle around the minimum. Comparison of BESS data with measurements by the Voyager spacecraft in the outer heliosphere will help clarify whether or not there are charge sign dependent effects of solar modulation.

4.5.5. Responsibilities Sample Clause.

1. NASA shall use reasonable efforts to develop Instrument X for flight on other Party's platform in accordance with the Instrument X Implementation Plan, which will define detailed terms and conditions for the development, launch, and initial checkout operations of Instrument X, consistent with this MOU. The other Party shall use reasonable efforts to _____. The Instrument X Implementation Plan shall be jointly developed by NASA and other Party, approved by the management points of contact, and maintained by NASA. In the event there is any conflict between the provisions of the Implementation Plan and this MOU, such conflict shall be resolved by giving precedence to this MOU.

2. The Mission Operations Implementation Plan, which defines additional terms and conditions consistent with this MOU for on-orbit instrument housekeeping; processing, archiving, and distribution of instrument data; and cooperative scientific activities shall be jointly developed by NASA and other Party, approved by the management points of contact, and maintained by NASA. In the event of any inconsistency between this MOU and the Mission Operations Implementation Plan, this MOU shall prevail.

4.5.6. Financial Arrangements - Nonreimbursable Agreement Sample Clause.

NASA and other Party shall each bear the costs of discharging their respective responsibilities, including travel and subsistence of personnel and transportation of all equipment and other items for which it is responsible. Further, it is understood that the ability of NASA and other Party to carry out their obligations is subject to the availability of appropriated funds. Should either party encounter budgetary problems which may affect the activities to be carried out under this Agreement, the party encountering the problems shall notify and consult with the other party as soon as possible.

4.5.7. Scheduling Conflicts Sample Clause.

The above schedule and milestones are estimated based upon the parties' current understanding of the projected use of the test facilities and equipment by NASA. In the event NASA's projected usage changes, other Party shall be given reasonable notice of that change, so that the schedule and milestones may be adjusted accordingly. The parties agree that NASA usage of personnel, test facilities, and equipment shall have priority over the usage planned in this Agreement, should a conflict arise, and NASA, in its sole discretion, shall determine whether to exercise that priority. Should a schedule conflict arise with other users, NASA, in its sole discretion, shall determine priority as between the users.

4.5.8. Management Points of Contact Sample Clause.

[Note: The sample clause provided below is for illustrative purposes only. Joint program management mechanisms and interfaces are highly particular to specific program needs.

The following sample clause is from a NASA – DARA (German space agency) space science agreement.]

The NASA and DARA Program Managers shall work closely together to ensure successful development, operation, and utilization of the Stratospheric Observatory for Infrared Astronomy (SOFIA) system. The Joint SOFIA Program Plan shall establish specific project teams and delineate their responsibilities as necessary for successful development, operation, utilization, and management of the SOFIA system. Prior to initiation of development work, the parties agree on operations responsibilities to be detailed in the Joint SOFIA Program Plan.

The SOFIA telescope assembly shall be developed, integrated, and tested by a prime contractor selected and managed by DARA. The other SOFIA system elements shall be developed, integrated, and tested by a prime contractor selected and managed by NASA. The overall SOFIA system shall be integrated and operated by the selected U.S. prime contractor as a facility jointly owned by the United States and Germany. Development and operation of the SOFIA observatory shall be conducted in a manner to ensure receipt of civil aircraft airworthiness certification by the United States Federal Aviation Administration.

Proposals for collaborative observing programs between United States and German scientists shall be peer reviewed as detailed in the Joint SOFIA Program Plan, and the SOFIA research flights selected shall be assigned as U.S. or German flights, as determined by the sponsor of the PI(s).

The NASA Point of Contact shall be:

Position
[Address]
[Phone]
[Email]

The DARA Point of Contact shall be:
Position
[Address]
[Phone]
[Email]

4.5.9.1.1. Liability and Risk of Loss – Cross-Waiver (Cross-Waiver with Flow Down Provision Sample Clause)

1. Each Party hereby waives any claim against the other Party, employees of the other Party, the other Party's Related Entities (including but not limited to contractors and subcontractors at any tier, grantees, investigators, customers, users, and their contractors or subcontractor at any tier), or employees of the other Party's Related Entities for any injury to, or death of, the waiving Party's employees or the employees of its Related

Entities, or for damage to, or loss of, the waiving Party's property or the property of its Related Entities arising from or related to activities conducted under this Agreement, whether such injury, death, damage, or loss arises through negligence or otherwise, except in the case of willful misconduct.

2. Each Party further agrees to extend this cross-waiver to its Related Entities by requiring them, by contract or otherwise, to waive all claims against the other Party, Related Entities of the other Party, and employees of the other Party or of its Related Entities for injury, death, damage, or loss arising from or related to activities conducted under this Agreement. Additionally, each Party shall require that their Related Entities extend this cross-waiver to their Related Entities by requiring them, by contract or otherwise, to waive all claims against the other Party, Related Entities of the other Party, and employees of the other Party or of its Related Entities for injury, death, damage, or loss arising from or related to activities conducted under this Agreement.

4.5.9.1.2 Liability and Risk of Loss – Cross-Waiver (Cross-waiver of liability for agreements for activities related to the International Space Station) Sample Clause (Based on 14 CFR 1266.102).

1. The objective of this Article is to establish a cross-waiver of liability in the interest of encouraging participation in the exploration, exploitation, and use of outer space through the International Space Station (ISS). The Parties intend that the cross-waiver of liability be broadly construed to achieve this objective.

2. For the purposes of this Article:

a. The term "Damage" means:

(i) Bodily injury to, or other impairment of health of, or death of, any person;
(ii) Damage to, loss of, or loss of use of any property;

(iii) Loss of revenue or profits; or

(iv) Other direct, indirect, or consequential Damage.

b. The term "Launch Vehicle" means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries Payloads, persons, or both.

c. The term "Partner State" includes each Contracting Party for which the Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station (IGA) has entered into force, pursuant to Article 25 of the IGA or pursuant to any successor agreement. A Partner State includes its Cooperating Agency. It also includes any entity specified in the Memorandum of Understanding (MOU) between NASA and the Government of Japan to assist the Government of Japan's Cooperating Agency in the implementation of that MOU.

d. The term “Payload” means all property to be flown or used on or in a Launch Vehicle or the ISS.

e. The term “Protected Space Operations” means all Launch Vehicle or Transfer Vehicle activities, ISS activities, and Payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of this Agreement, the IGA, MOUs concluded pursuant to the IGA, and implementing arrangements. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of Launch Vehicles or Transfer Vehicles, the ISS, Payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment and related facilities or services.

“Protected Space Operations” also includes all activities related to evolution of the ISS, as provided for in Article 14 of the IGA.

“Protected Space Operations” excludes activities on Earth which are conducted on return from the ISS to develop further a Payload's product or process for use other than for ISS-related activities in implementation of the IGA.

f. The term “Related Entity” means:

(i) A contractor or subcontractor of a Party or a Partner State at any tier;

(ii) A user or customer of a Party or a Partner State at any tier; or

(iii) A contractor or subcontractor of a user or customer of a Party or a Partner State at any tier.

The terms “contractor” and “subcontractor” include suppliers of any kind.

The term “Related Entity” may also apply to a State, or an agency or institution of a State, having the same relationship to a Partner State as described in paragraphs (2)(f)(i) through (2)(f)(iii) of this Article or otherwise engaged in the implementation of Protected Space Operations as defined in paragraph (2)(e) above.

g. The term “Transfer Vehicle” means any vehicle that operates in space and transfers Payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A Transfer Vehicle also includes a vehicle that departs from and returns to the same location on a space object.

3. Cross-waiver of liability:

a. Each Party agrees to a cross-waiver of liability pursuant to which each Party waives all claims against any of the entities or persons listed in paragraphs (3)(a)(i) through (3)(a)(iv) of this Article based on Damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waiver shall apply to any claims for Damage, whatever the legal basis for such claims, against:

(i) Another Party;

(ii) A Partner State other than the United States of America;

(iii) A Related Entity of any entity identified in paragraph (3)(a)(i) or (3)(a)(ii) of this Article; or

(iv) The employees of any of the entities identified in paragraphs (3)(a)(i) through (3)(a)(iii) of this Article.

b. In addition, each Party shall, by contract or otherwise, extend the cross-waiver of liability, as set forth in paragraph (3)(a) of this Article, to its Related Entities by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs (3)(a)(i) through (3)(a)(iv) of this Article; and

(ii) Require that their Related Entities waive all claims against the entities or persons identified in paragraphs (3)(a)(i) through (3)(a)(iv) of this Article.

c. For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the Convention on International Liability for Damage Caused by Space Objects, which entered into force on September 1, 1972, where the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

d. Notwithstanding the other provisions of this Article, this cross-waiver of liability shall not be applicable to:

(i) Claims between a Party and its own Related Entity or between its own Related Entities;

(ii) Claims made by a natural person, his/her estate, survivors or subrogees (except when a subrogee is a Party to this Agreement or is otherwise bound by the

terms of this cross-waiver) for bodily injury to, or other impairment of health of, or death of, such person;

(iii) Claims for Damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for Damage resulting from a failure of a Party to extend the cross-waiver of liability to its Related Entities, pursuant to paragraph (3)(b) of this Article; or

(vi) Claims by a Party arising out of or relating to another Party's failure to perform its obligations under this Agreement.

e. Nothing in this Article shall be construed to create the basis for a claim or suit where none would otherwise exist.

4.5.9.1.3 Liability and Risk of Loss – Cross-Waiver (Cross-waiver of liability for launch agreements for science or space exploration activities unrelated to the International Space Station Sample Clause) (Based on 14 CFR 1266.104).

1. The objective of this Article is to establish a cross-waiver of liability in the interest of encouraging participation in the exploration, exploitation, and use of outer space. The Parties intend that the cross-waiver of liability be broadly construed to achieve this objective.

2. For purposes of this Article:

a. The term "Damage" means:
(i) Bodily injury to, or other impairment of health of, or death of, any person;
(ii) Damage to, loss of, or loss of use of any property;
(iii) Loss of revenue or profits; or
(iv) Other direct, indirect, or consequential Damage.

b. The term "Launch Vehicle" means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries Payloads, persons, or both.

c. The term "Payload" means all property to be flown or used on or in a Launch Vehicle.

d. The term "Protected Space Operations" means all Launch Vehicle or Transfer Vehicle activities and Payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of an agreement for launch services. Protected Space Operations begins at the signature of this Agreement and ends when all activities done in implementation of this Agreement are completed. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of Launch Vehicles or Transfer Vehicles, Payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment and related facilities or services.

"Protected Space Operations" excludes activities on Earth that are conducted on return from space to develop further a Payload's product or process for use other than for the activities within the scope of an agreement for launch services.

e. The term "Related Entity" means:

(i) A contractor or subcontractor of a Party at any tier;

(ii) A user or customer of a Party at any tier; or

(iii) A contractor or subcontractor of a user or customer of a Party at any tier.

The terms "contractor" and "subcontractor" include suppliers of any kind.

The term "Related Entity" may also apply to a State, or an agency or institution of a State, having the same relationship to a Party as described in paragraphs 2(e)(i) through 2(e)(iii) of this Article, or otherwise engaged in the implementation of Protected Space Operations as defined in paragraph 2.d above.

f. The term "Transfer Vehicle" means any vehicle that operates in space and transfers Payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A Transfer Vehicle also includes a vehicle that departs from and returns to the same location on a space object.

3. Cross-waiver of liability:

a. Each Party agrees to a cross-waiver of liability pursuant to which each Party waives all claims against any of the entities or persons listed in paragraphs 3(a)(i) through 3(a)(iv) of this Article based on Damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waiver shall apply to any claims for Damage, whatever the legal basis for such claims, against:

i. the other Party;

ii. A party to another NASA agreement that includes flight on the same Launch Vehicle;

iii. A Related Entity of any entity identified in paragraphs 3(a)(i) or 3(a)(ii) of this Article; or

iv. The employees of any of the entities identified in paragraphs 3(a)(i) through 3(a)(iii) of this Article.

b. In addition, each Party shall extend the cross-waiver of liability, as set forth in paragraph 3.a of this Article, to its own Related Entities by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs 3(a)(i) through 3(a)(iv) of this Article; and
(ii) Require that their Related Entities waive all claims against the entities or persons identified in paragraphs 3(a)(i) through 3(a)(iv) of this Article.

c. For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the Convention on International Liability for Damage Caused by Space Objects, which entered into force on September 1, 1972, where the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

d. Notwithstanding the other provisions of this Article, this cross-waiver of liability shall not be applicable to:

(i) Claims between a Party and its own Related Entity or between its own Related Entities;

(ii) Claims made by a natural person, his/her estate, survivors, or subrogees (except when a subrogee is a Party to this Agreement or is otherwise bound by the terms of this cross-waiver) for bodily injury to, or other impairment of health of, or death of, such person;

(iii) Claims for Damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for Damage resulting from a failure of a Party to extend the cross-waiver of liability to its Related Entities, pursuant to paragraph 3.b of this Article; or

(vi) Claims by a Party arising out of or relating to another Party's failure to perform its obligations under this Agreement.

e. Nothing in this Article shall be construed to create the basis for a claim or suit where none would otherwise exist.

4.5.9.1.4. Liability and Risk of Loss - Third Party Claims Consultation (Sample Clause)

In the event of third-party claims for which the parties may be liable, the parties shall consult promptly to determine an appropriate and equitable apportionment of any potential liability and on the defense of any such claims.

4.5.9.2. Liability Convention Sample Clause (Liability/Risk of Loss).

Except as otherwise provided in Article ____ (the cross-waiver provision), the parties shall remain liable in accordance with the Convention on International Liability for Damage Caused by Space Objects (Liability Convention), which entered into force on September 1, 1972. In the event of a claim arising out of the Liability Convention, the United States and the Partner's government shall consult promptly on any potential liability, on any apportionment of such liability, and on the defense of such claim.

4.5.10. Registration of Space Objects Sample Clause.

The United States shall register named spacecraft as a space object in accordance with the 1976 Convention on the Registration of Objects Launched into Outer Space (the Registration Convention). However, exercise of jurisdiction and control over named space objects shall be subject to the relevant provisions of this Agreement. Registration pursuant to this Article will not affect the rights or obligations of the Parties under the 1972 Convention on International Liability for Damage Caused by Space Objects.

[If the other Party is not a governmental entity, and its government is to register the space object, the agreement should state that the other Party shall request that its government register the object. The second sentence should only be used where applicable.]

4.5.11. Transfer of Goods and Technical Data Sample Clause.

The Parties are obligated to transfer only those technical data (including software) and goods necessary to fulfill their respective responsibilities under this Agreement, in accordance with the following provisions, notwithstanding any other provisions of this Agreement:

1. All activities under this Agreement shall be carried out in accordance with the Parties' national laws and regulations, including those laws and regulations pertaining to export control and the control of classified information.

2. The transfer of technical data for the purpose of discharging the Parties' responsibilities with regard to interface, integration, and safety shall normally be made without restriction, except as required by paragraph 1, above.

3. All transfers of goods and proprietary or export-controlled technical data are subject to the following provisions.

- In the event a Party or its related entity (defined for the purpose of this Article as contractors, subcontractors, grantees, or cooperating entities, or any lower tier contractor, subcontractor, grantee, or cooperating entities of a Party) finds it necessary to transfer such goods or data, for which protection is to be maintained, such goods shall be specifically identified and such data shall be marked.
- The identification for such goods and the marking on such data shall indicate that the goods and data shall be used by the receiving Party and its related entities only for the purposes of fulfilling the receiving Party's or related entities' responsibilities under this Agreement, and that such goods and data shall not be disclosed or retransferred to any other entity without the prior written permission of the furnishing Party or its related entity.
- The receiving Party or related entity shall abide by the terms of the notice and protect any such goods and data from unauthorized use and disclosure.
- The Parties to this Agreement shall cause their related entities to be bound by the provisions of this Article through contractual mechanisms or equivalent measures.

4. All goods exchanged in the performance of this Agreement shall be used by the receiving Party or related entity exclusively for the purposes of the Agreement. Upon completion of the activities under the Agreement, the receiving Party or related entity shall return or otherwise dispose of all goods and marked proprietary or export-controlled technical data provided under this Agreement, as directed by the furnishing Party or related entity.

[Note: See note to Sample Clause 4.5.9.1.1 on use of "related entity."]

4.5.12. Intellectual Property Rights Sample Clause

1 Nothing in this MOU shall be construed as granting, either expressly or by implication, to the other Party any rights to, or interest in, any inventions or works of a Party or its Related Entities made prior to the entry into force of, or outside the scope of, this MOU, including any patents (or similar forms of protection in any country) corresponding to such inventions or any copyrights corresponding to such works.
2. Any rights to, or interest in, any invention or work made in the performance of this MOU solely by one Party or any of its Related Entities, including any patents (or similar forms of protection in any country) corresponding to such invention or any copyright corresponding to such work, shall be owned by such Party or Related Entity. Allocation of rights to, or interest in, such invention or work between such Party and its Related Entities shall be determined by applicable laws, rules, regulations, and contractual obligations.

3. It is not anticipated that there will be any joint inventions made in the performance of this MOU. Nevertheless, in the event that an invention is jointly made by the Parties in

the performance of this MOU, the Parties shall, in good faith, consult and agree within 30 calendar days as to:

(a) the allocation of rights to, or interest in, such joint invention, including any patents (or similar forms of protection in any country) corresponding to such joint invention;
(b) the responsibilities, costs, and actions to be taken to establish and maintain patents (or similar forms of protection in any country) for each such joint invention; and
(c) the terms and conditions of any license or other rights to be exchanged between the Parties or granted by one Party to the other Party.

4. For any jointly authored work by the Parties, should the Parties decide to register the copyright in such work, they shall, in good faith, consult and agree as to the responsibilities, costs, and actions to be taken to register copyrights and maintain copyright protection (in any country).

5. Subject to the provisions of Article [__] (Transfer of Goods and Technical Data) and Article [__] (Release of Results and Public Information), each Party shall have an irrevocable royalty free right to reproduce, prepare derivative works, distribute, and present publicly, and authorize others to do so on its behalf, any copyrighted work resulting from activities undertaken in the performance of this MOU for its own purposes, regardless of whether the work was created solely by, or on behalf of, the other Party or jointly with the other Party.

4.5.13. Rights in Resulting Data Sample Clause.

1. Any reservation of science data to the Principal Investigators and Co-Investigators will be done in accordance with provisions to be agreed upon by the Parties. Any such reservation shall be as short as possible, but not more than 1 year.

2. The Parties will share science data generated under this Agreement in accordance with provisions for sharing of science data to be agreed upon by the Parties.

4.5.14. Release of Results and Public Information Sample Clause.

1. The Parties retain the right to release public information regarding their own activities under this Agreement. The Parties shall coordinate with each other in advance concerning releasing to the public information that relates to the other Party's responsibilities or performance under this Agreement.

2. The Parties shall make the final results obtained from the [___] Mission available to the general scientific community through publication in appropriate journals or by presentations at scientific conferences as soon as possible and in a manner consistent with good scientific practices.

3. The Parties acknowledge that the following data or information does not constitute public information and that such data or information shall not be included in any

publication or presentation by a Party under this article without the other Party's prior written permission:

(a) data furnished by the other Party in accordance with Article [___] (Transfer of Goods and Technical Data) of this Agreement which is export-controlled, classified, or proprietary; or

(b) information about an invention of the other Party before an application for a patent (or similar form of protection in any country) corresponding to such invention has been filed covering the same, or a decision not to file has been made.

[Note: clause 4 will be used only in SAAs with the European Space Agency (ESA), when appropriate.

4. In all publications concerning the [_____] Mission and its results, the Parties will endeavor to acknowledge that [_____] is an ESA mission with instruments funded by the ESA Member States and NASA.

4.5.15.1. Duty Free Entry Sample Clause (Customs/Taxes/Immigration).

In accordance with its laws and regulations, each party shall facilitate free customs clearance and waiver of all applicable customs duties and taxes for goods necessary for the implementation of this Agreement. In the event that any customs duties or taxes of any kind are nonetheless levied on such equipment and related goods, such customs duties or taxes shall be borne by the party of the country levying such customs duties or taxes.

4.5.15.2. Facilitate Movement of Persons and Goods Sample Clause (Customs/Taxes/Immigration).

Each of the parties shall facilitate the movement of persons and goods necessary to comply with this Agreement into and out of its territory, subject to its laws and regulations.

4.5.15.3. Facilitate Entry and Resident Documentation Sample Clause (Customs/Taxes/Immigration).

Subject to its laws and regulations, each party shall facilitate provision of the appropriate entry and residence documentation, if required, for the other party's nationals who enter, exit, or reside within its territory in order to carry out the activities under this Agreement.

4.5.16. Ownership of Equipment Sample Clause.

Equipment provided by NASA pursuant to this Agreement shall remain the property of NASA. Equipment provided by the other party pursuant to this Agreement shall remain the property of the other party. Each party agrees to return any of the other party's equipment in its possession to the other party at the conclusion of the project.

4.5.17. Consultation and Dispute Resolution Sample Clause.

The parties agree to consult promptly with each other on all issues involving interpretation, implementation, or performance of the Agreement. An issue concerning the interpretation, implementation, or performance of this Agreement shall first be referred to the appropriate points of contact named above for the parties. If they are unable to come to agreement on any issue, then the dispute shall be referred to the Agreement signatories or their designated representatives for joint resolution.

4.5.18. Mishap Investigation Sample Clause.

In the case of a mishap or mission failure, the parties agree to provide assistance to each other in the conduct of any investigation, bearing in mind, in particular, the provisions of Article (Transfer of Goods and Technical Data). In the case of activities which might result in the death of or serious injury to persons, or substantial loss of or damage to property as a result of activities under this Agreement, the parties agree to establish a process for investigating each such mishap as part of their program/project implementation agreements.

4.5.19. Modifications/Amendments Sample Clause.

This Agreement may be amended at any time by mutual written agreement

4.5.20. Choice of Law Sample Clause.

U.S. Federal law governs this Agreement for all purposes, including, but not limited to, determining the validity of the agreement, the meaning of its provisions, and the rights, obligations and remedies of the parties.

4.5.21.1. Entry into Force, Term, and Termination MOU Sample Clause.

This Memorandum of Understanding shall enter into force upon signature [or "upon an exchange of diplomatic notes confirming each party has completed its domestic legal requirements for entry into force"]. The MOU shall remain in force for a period of (#) years. The MOU may be terminated by either party after (#) months written notification of intent to terminate [or by notifying the other party, in writing, via diplomatic channels, (#) months in advance].

4.5.21.2. Entry into Force, Term, and Termination Letter Agreement Sample Clause.

If the above terms and conditions are acceptable to [other party], I propose that this letter, together with your written affirmative reply, constitute an Agreement between NASA and [other party] that shall enter into force for a period of (#) years on the date of your affirmative reply. This Agreement may be terminated by either Party upon (#) months written notice.

4.5.22. Continuing Obligations Sample Clause.

The obligations of the parties concerning [e.g., "Liability and Risk of Loss," "Transfer of Goods and Technical Data, "Intellectual Property," (and "Financial Arrangements" if reimbursable)] of this Agreement shall continue to apply after the expiration or termination of this Agreement.

4.5.23. Anti-Deficiency Act Sample Clause.

All activities under or pursuant to this Agreement are subject to the availability of appropriated funds and the parties' respective funding procedures.

4.5.24. Authority to Conclude Sample Clause.

Each Party to this Agreement represents that:

1. It has the full right, power, and authority to enter into this Agreement and to render the performance of all responsibilities and grant of any rights as set forth in this Agreement; and

2. Its representative whose signature is affixed to this Agreement has full capacity and authority to bind it to the terms hereof.

4.5.25. Provisional Application.

This Agreement shall be applied provisionally as of the date of signature and shall enter into force upon exchange of notifications between the Parties confirming that all relevant domestic procedures and requirements necessary for this Agreement's entry into force have been fulfilled.

4.5.26. Signatory Authority Sample Clause.

Done in Washington in two copies, in the English and [ ] languages, both texts being equally authentic, this

_____ day of _____, 200__.

For the Government of the Russian Federation

For the Government of the United States of America

CHAPTER 5. FUNDED AGREEMENTS

5.1. GENERAL GUIDANCE

A funded SAA permits appropriated funds to be transferred to NASA's partner to accomplish a NASA mission. However, funded SAAs can only be used when the Agency objective cannot be accomplished through the use of a procurement, or reimbursable/nonreimbursable SAA.[71] In accordance with section 203(c)(5) of the Space Act, "to the maximum extent practicable and consistent with the accomplishment of the purpose of the [Space] Act, such … other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in conduct of the work of the Administration."

The flexibility of the Space Act provides NASA and its SAA partners the means to formulate a relationship that permits optimal results. Funded SAAs are limited to activities undertaken with U.S. domestic partners and are not available for NASA's international activities. Selection of a funded SAA partner is best served via a competitive process. Before NASA may enter into a funded SAA, a cost estimate of the funding and, as appropriate, the value of any other NASA resources to be committed under the Agreement, must be prepared and reviewed by the NASA CFO (for Headquarters SAAs) or Center CFOs (for Center SAAs) so that the signing official has a basis for determining that the proposed contribution of NASA is fair and reasonable when compared to NASA program risks, corresponding benefits to NASA, and the funding and resources to be contributed by the agreement partner. All funded SAAs are governed by U.S. Federal law. Additionally, all funded SAAs will be provided for review to the Office of General Counsel at Headquarters prior to execution.

5.2. FUNDED AGREEMENT CONTENTS

Funded SAAs do not have a standard format but generally include language that describes the relationship and responsibilities of the parties and the objective of the agreement. Certain subject areas, similar to those in nonreimbursable SAAs, should be addressed in all funded SAAs. For guidance and suggested language to be used with private sector parties, see Chapter 2; for guidance on agreements with U.S. public parties, see Chapter 3. In addition to appropriated funds, SAAs may also include access to or the use of other NASA resources, such as personnel, expertise, services, equipment, information, intellectual property, or facilities.

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[71] *Funded Agreement – Nonprofit Institutions of Higher Education:* These funded SAAs require NASA Program Offices to complete and submit a C.A.S.E. Report of College and University Projects, NASA Form 1356. This form is required for each funded SAA with nonprofit institutions of higher education or to nonprofit institutions that are operationally affiliated or integrated with an educational institution. The completed forms are submitted to the NASA's Office of Human Resources and Education, Education Division. Information on this form is used to produce reports required by the National Science Foundation (NSF), pursuant to a NSF statutory requirement.

5.2.1. FINANCIAL OBLIGATIONS

Funded SAAs should include language detailing NASA's intended contribution of appropriated funds and any other NASA resource, such as personnel, expertise, services, equipment, information, intellectual property, or facilities.

5.2.1. Financial Obligations (Sample Clause)

5.2.2. ACCOUNTING AND AUDIT

A requirement to include an "Accounting and Audit" paragraph is specific to funded SAAs. Given that NASA is providing funding to the other party, additional safeguards are required to ensure the funds are being used only for the intended purposes described in the funded SAA. Therefore, any funded SAA partner is required to account for project-related expenditures and to use an accounting system operated in accordance with Generally Accepted Accounting Principles (GAAP). Lastly, the NASA Inspector General, or U.S. Comptroller General, or his/her representative, must be given the right of timely and unrestricted access to any records that are pertinent to the use of NASA funds.

5.2.2. Accounting and Audit (Sample Clause)

5.2.3. INTELLECTUAL PROPERTY

Funded SAAs should address the allocation of intellectual property rights. Determining the appropriate allocation of intellectual property rights for funded SAAs is a fact-specific, case-by-case determination. Therefore, NASA patent counsel should be consulted early in the process.

5.3. JOINT SPONSORED RESEARCH AGREEMENT

One example of a funded SAA is a Joint Sponsored Research Agreement (JSRA). A JSRA is a collaborative agreement where NASA may provide resources including funds, services, equipment, information, intellectual property or facilities on a shared or pooled basis for the purpose of advancing mission goals and transferring the resulting technology to the private sector via a non-Government partner or consortia, for example, an SAA for the development and commercialization of NASA dual-use technologies.

Cash or in-kind contributions by the industry partner will be required and must be in reasonable (equitable) proportion to the funds committed by NASA. Consideration may be given to the objective of the funded SAA and the monetary/nonmonetary commitment. Further, one of the following three objectives must also be met: (1) the SAA must enhance U.S. industry's competitive position in the global marketplace; (2) the SAA must convert aerospace or defense technology to commercial application; or (3) the SAA must enhance NASA's investment in technology development, reducing its cost through the combined effort. JSRAs may be useful in a dual-use research project involving an

industry-led consortium. This type of SAA involves a research and development (R&D) collaboration between NASA and the private sector over technologies (*e.g.* product or process) relevant to NASA's mission and sought by the private sector for commercial applications. By working together, NASA and the private sector party accelerate the development of technologies while sharing costs. Intellectual property rights are shared in a manner that fosters the commercialization of the resulting technology.

NASA's role is to stimulate U.S. technology growth in areas that are likely to have a significant impact on U.S. technology leadership or global competitiveness, consistent with NASA's mission. While NASA would be involved in determining broad project goals, industry is required to set specific R&D objectives and develop R&D task plans. In addition, U.S. industry participants develop Articles of Collaboration (or other mechanisms for establishing multiparty relationships) that delineate management structure, technical and financial responsibilities, and intellectual property rights and which are signed by all private sector parties to the JSRA. However, the JSRA can be signed by a representative of the total membership.

5.4. ECONOMY ACT ACQUISITIONS

Where NASA needs supplies or services from a U.S. Federal Government entity, or supplies or services are required of NASA by a U.S. Federal Government entity, authority for such "interagency acquisitions" is found in both the Space Act and the Economy Act [31 U.S.C. § 1535]. While a U.S. Federal Government entity may utilize the Economy Act authority for its acquisitions, NASA policy requires that "the Space Act shall be cited as authority for all NASA interagency acquisitions except that the Inspector General Act shall be cited as the authority for interagency acquisitions for the NASA Office of Inspector General." [48 CFR Part 1817, NFS Subpart 1817.70 – Interagency Acquisitions].

The U.S. Federal Government entity utilizing an interagency acquisition is referred to as the requesting agency and the agency supplying the supplies or services is referred to as the servicing agency. [48 CFR Part 17, FAR 17.501.] The transfer of funding must be on a full cost recovery basis and effectuated through an interagency fund transfer instrument, a requirement of both the Economy Act and interagency acquisition under the Space Act. Moreover, all interagency fund transfer instruments, whether being authorized by the Economy Act or the Space Act, must be supported by a Determination and Finding (D&F) [48 CFR Part 17, FAR 17.503 on interagency acquisitions pursuant to the Economy Act; 48 CFR Part 1817, NFS 1817.7002 on interagency acquisitions pursuant to the Space Act.]

The D&F required to support an interagency acquisition must document the following: (1) it is in the best interests of the Government; and (2) the supplies or services cannot be obtained as conveniently or economically from a private source. In addition, if the interagency acquisition requires contracting action by the servicing agency, the D&F also needs to document one of the following: (1) the acquisition will appropriately be made under an existing contract of the servicing agency; (2) the servicing agency has

capabilities or expertise which are not available within the requesting agency; or (3) the servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies.

In addition, where the interagency acquisition is with the Department of Defense or one of its entities, NASA Form 523 is required to be completed by NASA personnel. Agency procurement officials and procurement counsel can provide guidance for interagency acquisition activities.

APPENDIX 5. SAMPLE CLAUSES – FUNDED AGREEMENTS

5.2. AGREEMENT CONTENTS

5.2.1. Financial Obligations Sample Clause.

It is NASA's intent to provide cash and in-kind resources to Partner during the term of this Agreement as indicated below. [Indicate resources by fiscal year]. The actual commitments may vary from the projected amounts shown. Funding in the amount of $$ is available beginning on [date]. Subsequent NASA funding and resources will be provided in accordance with annual progress and subject to the availability of appropriated funds. Of the budget amounts shown above, NASA resources will only be obligated as required in the Annual Plan and as funds become available. Under no circumstances shall any party undertake any action which could be construed to imply an increased commitment on the part of NASA.

5.2.2. Accounting and Audit Sample Clause.

Partner agrees to account for all project-related expenditures that include NASA funding and are undertaken as part of this Agreement. An accounting system must be established for the Agreement that is maintained in accordance with Generally Accepted Accounting Principles (GAAP). NASA's Inspector General, the U.S. Comptroller General, or their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the expenditures, in order to make audits, examinations, excerpts, transcripts, and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interviews and discussion related to such documents. The rights of access in this paragraph are not limited to any required retention period, but shall last as long as records are retained.